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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SHAKESPEARE COMPANY, a Delaware Corporation

Petitioner

vs.

FURY IMPORTS, INC., a New York Corporation

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a party's admissions of damages in 1970 are properly excluded under Federal Rule of Evidence 403 if accrual of damages in 1970 bars the claim under the Statute of Limitations, and where the Court's exercise of discretion is wholly unexplained.

II. Whether Federal Rule of Civil Procedure 41(a)(2) permits a party seeking to avoid a three year statute of limitations to withdraw, over objection, contested claims for damages suffered more than three years before the filing of its Complaint.

III. Whether under Federal law a Court may, in a diversity action, refuse to consider applicable state choice of law rules and foreign law, timely asserted before retrial, if consideration was previously denied on the grounds that foreign law had not been timely raised under Federal Rule of Civil Procedure 44.1.

IV. Whether the failure of the United States Court of Appeals to apply applicable state law in a diversity case amounted to a refusal to follow this Court's direction in *Day & Zimmerman, Inc.* v. *Challoner*, 423 US 3 (1975).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Shakespeare Company, a Delaware Corporation, prays for issuance of a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 8, 1980, with rehearing denied December 3, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is an Opinion published at 625 F.2d 585 and entered September 8, 1980. A copy of the Opinion is included in the Appendix. The Fifth Circuit's Opinion denying rehearing was entered December 3, 1980, in Fifth Circuit Docket No. 78-2962 and is as yet unpublished. A copy is in the Appendix.

The Opinions of the Fifth Circuit affirmed an Order of the United States District Court for the Southern District of Florida entered in its Case No. 74-49 on August 11, 1978. The District Court's Order was unpublished. A copy appears in the Appendix.

A previous decision of the Fifth Circuit was entered June 24, 1977, with rehearing denied August 22, 1977. The Opinion was reported at 554 F.2d 1376. A copy appears in the Appendix. The Fifth Circuit's previous Opinion reversed an unpublished Opinion and Order of the United States District Court for the Southern District of Florida entered on April 21, 1975, in its Case No. 74-49. A copy of the District Court's Opinion and Order is in the Appendix.

CONCISE STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to hear this case on certiorari under 28 U.S.C. § 1254(1). A written Opinion was issued by the United States Court of Appeals for the Fifth Circuit on September 8, 1980. Petitioner, Shakespeare Company, Inc., filed a timely Petition for Rehearing. Rehearing was denied on December 3, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the New York statute of limitations, the Florida borrowing statute, the Japanese civil code, Federal Rule of Evidence 403, Federal Rule of Evidence 801(d)(2)(B), (C) and (D), and Federal Rule of Civil Procedure 44.1 are set forth in the Appendix.

CONCISE STATEMENT OF THE CASE

On January 15, 1974, Fury Imports, Inc. ("Fury") filed a 28 USC § 1332 diversity action in the Southern District of

Florida. Shakespeare Company[1] ("Shakespeare") and Southern Tackle Distributors ("STD") were named as defendants.

Fury's amended Complaint of May 17, 1974, claimed Shakespeare "deliberately and willfully embarked upon a course of conduct . . . purposely designed to interfere with the contractual rights" of Fury with Ohmori, a Japanese fishing reel supplier. (60a).*

Fury and Ohmori had a written contract making Fury the exclusive distributor of a certain fishing reel. (52a) On June 10, 1970, Ohmori contracted with Shakespeare to stop selling to Fury within a year and to make Shakespeare his only customer (56a, 58a).

On September 10, 1974, the Fifth Circuit denied Shakespeare's interlocutory appeal seeking a stay pending Japanese arbitration. On September 11, 1974, Shakespeare gave written notice of its intention to raise Japanese law barring punitive damages, the tort having been committed, if at all, in Japan (61a).

Trial began September 19, 1974. Proofs showing the unavailability of punitive damages under Japanese law were received (43a, 69a) but on April 21, 1975, the District Court held Shakespeare's notice of foreign law untimely under Rule 44.1 (42a).

The Court held a stipulation of law, reflected in Shakespeare's notice of applicable Japanese law, was an agreement to apply New York law on punitive damages. (43a).

The statute of limitations was a defense. Fury originally claimed that Florida's statute of limitations applied (39a). All parties now agree that New York's three year statute of limitations governs (4a).

---

[1] Shakespeare Company is a wholly owned subsidiary of Anthony Industries, Inc., a Delaware corporation.

* Parenthetical number references are to the appendix.

Tortious interference is not a continuing tort under New York law. Fury's claim was barred if the first tortious interference occurred before January 15, 1971.

At the first trial, Fury claimed $9,327.24 in damages for 1970. The verdict included $35,278.88 for 1970 (32a).

The District Court found the suit timely under *Florida's* statute of limitations "as it was filed within four years of the act of inducement which occurred on June 10, 1970. . . ." (43a).

A judgment n.o.v. was granted on April 21, 1975. (51a) The Fifth Circuit agreed that Fury's proof of damages was inadequate, but reversed and remanded for a new trial on all issues (34a-35a).

The Appeals Court found punitive damages permissible under New York law. It did not disturb the District Court's interpretation of the stipulation of applicable law. No choice of law rules, or Japanese law, was discussed.

The judgment in favor of STD was not appealed. STD is no longer a party to the action (15a-16a).

On March 28, 1978, Shakespeare filed another Rule 44.1 written notice of its intent to raise Japanese law concerning punitive damages (Record 653). The retrial began May 23, 1978.

The Court permitted Fury to withdraw, over objection, its 1970 damage claim (73a-81a). It refused to admit Fury's attorneys' claims that Fury was damaged in 1970, saying that it had authority to exclude the admissions under Rule 403 (84a-85a). The Court denied Shakespeare's request to define "damages" to the jury. It refused Shakespeare's requested jury instruction saying an "anticipatory breach" of contract by Ohmori could be "damage" to Fury (76a-78a, 81a).

The Court's instructions conveyed to the jury "that the Plaintiff was suing for inducement to breach, not for making performance more difficult" (8a). Through special inter-

rogations the jury was asked whether the first "breach" of the Ohmori/Fury contract occurred after January 15, 1971. The jury determined Fury's damages for each year from 1971 onward (86a-87a).

Fury was awarded $931,391, including $600,000 in punitive damages. Shakespeare's motion for Judgment n.o.v., was denied. The Court said "the relevant factual issues" on the statute of limitations had been submitted to the jury. It again held Shakespeare's 1974 letter claiming Japanese law barred punitive damages to be an agreement to apply New York law on punitive damages. The Court also said that "even if New York's choice of law rules are applicable, that law would allow the granting of punitive damages" (11a-12a).

Shakespeare sought reversal because punitive damages were barred by application of Japanese law through the choice of law rules of Florida (the forum) or New York (the forum by stipulation).

Shakespeare also claimed that Fury's admissions of damages in 1970 were not properly withdrawn or suppressed and that the claim was barred by the statute of limitations.

The Court of Appeals acknowledged that its prior opinion did not "expressly decide which body of law controlled punitive damages," (3a) but it refused to consider Japanese law or any choice of law rules, saying that its prior opinion implicitly made New York local law on punitive damages the "law of the case" (3a).

The Appeals Court rejected consideration of all damages caused by Shakespeare's interference in 1970 because Fury did not seek damages because Shakespeare made performance of its contract more difficult" (7a).

The Court held that under New York law a "breach" or complete severance of the contractual relationship was a necessary element of the tort Fury sued on.

The Fifth Circuit upheld the exclusion of Fury's claim of damages in 1970, under FRE 403. The Court did not discuss whether part of the claim for damages could be withdrawn over objection under FRCP 41(a)(2). It did not discuss whether Rule 44.1 permits a party to raise an issue of foreign law at retrial if it was not considered before because of untimeliness.

Shakespeare petitioned for rehearing because the Court's September 8, 1980, opinion ignored *Guard-Life Corp.* v. *S. Parker Hardware Mfg. Corp.*, 428 N.Y.S.2d 628 (1980), a May 1, 1980, decision of New York's highest court. By adopting the Restatement (second) Torts § 766, *Guard-Life* rejected the dichotomy between "inducement to breach" and "interference with contract" that formed the basis of the Fifth Circuit's opinion.

The Fifth Circuit denied rehearing. It acknowledged that no matter what name was applied, the tort was the same. However, it still refused to consider whether the damages claimed by Fury in 1970 commenced the running of the statute of limitations. It did not modify its holding that interference short of inducing a breach did not start the statute of limitations running. (9a-10a)

Shakespeare now brings to this Court its Petition for Certiorari under 28 USC 1254(1).

REASONS FOR ALLOWANCE OF THE WRIT

I. MISUNDERSTANDING AND ABUSE OF FEDERAL RULE OF EVIDENCE 403 IS A RECURRING, IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THE SUPREME COURT.

(A) The Exercise of Wholly Unexplained Discretion To Exclude a Party's Admissions of Material Facts Is a Misapplication of FRE 403 and an Example of the Chronic Abuse of the Rule.

The Supreme Court has not decided a case dealing with FRE 403 since the Federal Rules of Evidence were adopted.

Chronic abuse and misapplication of Rule 403 has been described by respected Commentators and cautioned against by courts.

In *Wright and Graham,* Federal Practice Procedure: Evidence § 5223 it is said:

> "Unhappily, it must be reported that some of the most conspicuous abuses of Rule 403 discretion are to be found in appellate opinions. Too often these opinions treat Rule 403 as a grant of unfettered discretion to the trial judge—"great discretion" in the words of one such opinion—rather than as a rule requiring a careful balancing of factors so as to check discretion. Worse yet is the use of discretion as a magic solvent for evidentiary issues on appeal. The unstated line of reasoning in this issue-ducking use goes something like this: the trial judge may have erred in excluding this evidence on grounds that it was hearsay, but since he could have excluded it under Rule 403 in any event, it is not necessary to discuss the hearsay error.
>
> This loose usage of Rule 403 by appellate courts is unfortunate for a number of reasons. First, it sets a bad example for trial courts whose method of exercising discretion is substantially more important than any appellate application of the rule. Second, if every challenged ruling of the trial judge is to be buried beneath gobs of gooey discretion, it is difficult to see how we will ever have any of the 'growth and development' of the law of evidence that is enjoined by Rule 102. Finally, such appellate treatment of discretion, because of its visibility, may discredit the concept even if trial judges are much more responsible in exercising discretion and ultimately lead to efforts to replace Rule 403 with something more like the mandatory rule that was originally proposed."

1 Weinstein's Evidence ¶403[2] says:

> ". . . Rule 403 should be applied infrequently and cautiously by trial judges. When it is used, a clear statement of the reason should be made for the record. . ."

U.S. v. *Long*, 574 F.2d 761, 766 (3d Cir.), cert. denied 439 U.S. 985 (1978) held:

> "Where an objection does invoke Rule 403, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal."

John McShain, Inc. v. *Cessna Aircraft Co.* 563 F.2d 632, 635 (3d Cir. 1977) held that:

> "[T]he balance required [by Rule 403] is not a *pro forma* one. A sensitive analysis of the need for the evidence as proof of a contested factual issue, of the prejudice which may eventuate from admission, and of the public policies involved is in order before passing on such an objection. The substantiality of the consideration given to competing interests can be best guaranteed by an explicit articulation of the trial court's reasoning."

See also authorities cited in *Miller* v. *Poretsky*, 595 F.2d 780, 794 n.41 (D.C. Cir. 1978) (Robinson J. concurring); *Government of Virgin Islands* v. *Felix*, 569 F.2d 1274, 1280 (3d Cir. 1978); and *U.S.* v. *Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976).

In this case the District Judge used Rule 403 to keep from the jury admissions of Plaintiff's counsel on a key issue of fact. His exercise of discretion was wholly unexplained. The Court of Appeals upheld, without requiring the trial court to explain the exercise of its discretion. The Fifth Circuit thus implicitly put itself in conflict with at least three circuits.

If Fury was damaged in 1970 as a result of Shakespeare's tortious interference, its claim was barred by the statute of limitations. At the first trial Plaintiff's lawyer said that Fury was "entitled to a directed verdict for the year 1970 beyond any question... I feel that we are entitled to one on the issue of breach of contract" (71a). He told the jury that: "We claim our damages in the year 1970 were $9,327.24" (72a).

On retrial Shakespeare offered these statements under FRE 801(d)(2)(B)(C) & (D) (71a-72a, 82a-83a). Fury opposed introduction saying that "nothing could be further from the truth" than to say Fury was claiming damages in 1970 (84a). On retrial Fury claimed it didn't suffer damages until 1973, because it had "back-ordered" reels in 1970, 1971 and 1972 (80a). It told the second jury "we haven't asked for damages in the year 1970 because we got our order that year" (85a).

The trial judge ducked the hearsay issue, saying: "It may come under 801 or it may not" (84a). He avoided determining relevancy, saying only: "You are not permitted to argue in terms of saying that [Plaintiff's Counsel] at the last trial argued this. I think that that is frocked with prejudicial aspects. And even though it might be relevant, I think 403 would permit me to exclude it" (84a-85a).

There was none of the careful, "delicate," explicit balancing on the record of competing interests that would have been required in the Second, Third or D.C. Circuits. See *Government of Virgin Islands* v. *Felix*, 569 F.2d 1274, 1280 n.13 (3d Cir. 1978); *U.S.* v. *Long, supra; U.S.* v. *Dwyer, supra* and *Miller* v. *Poretsky, supra.*

The Court of Appeals did no better. It did not mention FRE 801. It demurred on the question of relevancy under Rule 401 and said:

> "[T]he trial judge was within his discretion in excluding it under Rule 403, which allows the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" (8a).

The Court cited as authority *U.S.* v. *Frick*, 588 F.2d 531 (5th Cir. 1979), *cert. denied* 441 U.S. 913 and *U.S.* v. *McDaniel*, 574 F.2d 1224 (5th Cir. 1978), *cert. denied* 441 U.S. 952, cases involving inflammatory evidence about the adverse

party's possible involvement in sexual misconduct or membership in an undesirable social group. By failing to require the trial court to articulate its reasons for exclusion under Rule 403, the Court implicitly held that no such explanation was required.

Certiorari should be granted to resolve the conflict among the circuits and to exercise the Court's power of supervision. Lower courts should be directed to give sufficient indications of the bases of their decisions under Rule 403 to make meaningful appellate review possible and to assure that the Rule is applied rationally and in keeping with its purposes. The question of the proper application of Rule 403 "is important and recurring," *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959). Certiorari should be granted to finally resolve the question.

(B) This Case Is an Example of the Misapplication of Rule 403.

Arguments of Counsel made to a Court bind the client. Courts act on the oral concessions and admissions of lawyers. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 388 (1978); *U.S.* v. *Dooley*, 424 F.2d 1067 (5th Cir. 1970); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 362 n.16 (1973).

29 Am. Jur. 2d, *Evidence* § 615 says:

> "Judicial admissions are evidence against the party who made them . . . and may constitute the basis of a verdict, whether made in writing or orally by counsel, or informally by the testimony of a party."

If Fury's lawyer had claimed damages for 1970 in his opening statement, the Court could have considered his oral admission in directing a verdict. *Oliver* v. *Southern Ry. Co.*, 475 F.2d 895, 897 (D.C. Cir. 1972).

The admissions to be considered in deciding a Rule 56 Motion "may be established in any appropriate manner [including] statements of counsel made in oral or written argument. . ." 6 Moore's Federal Practice ¶ 56.11[6]

The admissions would have been properly considered had they been made in a pretrial statement (*Broderick Wood Products Co.* v. *U.S.*, 195 F.2d 433, 435 (10th Cir. 1952)) or a pleading (*Allison* v. *Mackey*, 188 F.2d 983 (D.C. Cir. 1951)) or a superseded pleading. *State Farm Mut. Auto. Ins. Co.* v. *Porter*, 186 F.2d 834 (9th Cir. 1950); Annot., 52 A.L.R.2d 516, 523 (1959).

A lawyer's statements made with the authority of his client on a matter for which the lawyer has been retained are the admissions of the client. *U.S.* v. *Dolleris*, 408 F.2d 918 (6th Cir. 1969); *U.S.* v. *Tuschman*, 405 F.2d 688, 690 (6th Cir. 1969). Under FRE 801(d)(2)(C) & (D) these admissions are not hearsay.

> "[A]dmissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made . . ." *Reed* v. *McCord*, 160 N.Y. 330, 54 N.E. 737 (Ct. of App. 1889).

The admissions of a party have "considerable probative value." *H.B. Zachry Co.* v. *O'Brien*, 378 F.2d 423, 425 (10th Cir. 1967). Evidence of great probative value should not be "excluded in the absence of a significant showing of unfair prejudice." *U.S.* v. *Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976).

Rule 403 permits rejection of relevant evidence:

> "If its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . ."

The Advisory Committee's note to Rule 403 says:

> " 'Unfair prejudice' within this context means an undue tendency to suggest decision on an improper basis, commonly, although not necessarily, an emotional one."

Weinstein's Evidence ¶ 403[03] says:

> "Evidence that appeals to the jury's sympathies, arouses a sense of horror, provokes its instinct to punish, or triggers

> other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case."

Fury did not claim that admission of its lawyer's claim of damages in 1970 would arouse in the jury a sense of sympathy or horror or that it might provoke an instinct to punish, or trigger some other mainspring of human action. Fury argued against admission because its theory of recovery had changed from the first trial (80a). Fury's denials of facts it had previously admitted simply made "a case of conflict of testimony" to be determined by a jury. *State Farm Mut. Auto. Ins. Co.* v. *Porter*, 186 F.2d 834, 844 (9th Cir. 1950).

> " '[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair' ". *Dollar* v. *Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977)

Neither Fury, the District Court nor the Fifth Circuit described the "unfairness" of letting the jury hear admissions that might have caused Fury to lose its case. If the evidence was excluded simply because it was damaging, then Rule 403 was grossly misapplied.

> "Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.
>
> * * *
>
> "It is not designed to permit the court to 'even out' the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none." *U.S.* v. *McRae*, 593 F.2d 700, 707 (5th Cir. 1979).

The result of the misapplication of Rule 403 here was to 'even out' the evidence. Rather than preventing a trial conducted "on unreal facts," the Court's decision encouraged it.

Suppression of highly probative, relevant admissions, in the absence of substantial and unfair prejudice is a significant departure from the accepted and usual course of judicial proceedings. This departure, the absence a decision of this Court explaining Rule 403 and likely continued misapplication of the Rule urgently require the grant of Certiorari.

II. PERMITTING A PARTY SEEKING TO AVOID A THREE YEAR STATUTE OF LIMITATIONS TO WITHDRAW, OVER OBJECTION, A CLAIM FOR DAMAGES SUFFERED MORE THAN THREE YEARS BEFORE THE FILING OF ITS COMPLAINT IS A SIGNIFICANT DEPARTURE FROM THE PURPOSE OF FED. R. CIV. P. 41(a)(2).

The Interpretation Of Rule 41(a)(2) Involves An Important Question of Federal Law Which Ought To Be Resolved By This Court.

Rule 41(a)(2) prohibits withdrawal of a claim if an answer has been filed, where prejudice to the Defendant will result. Permission of the Court is required in any event. This Court has never interpreted Rule 41(a)(2).

The general rule is that:

> "[A] voluntary termination may be entered in actions at law by a plaintiff as to part of the cause of action he alleges where such a termination does not prejudice the rights of other parties." 24 Am. Jur. 2d, *Dismissal, Discontinuance and Nonsuit*, § 10.

Fury withdrew its claim for damages for 1970. Its lawyer called its damages in 1970 "insignificant," saying that Fury

didn't "want to get into an argument over that amount of damages. . ." (67a) Shakespeare objected to withdrawal of the claim for damages for 1970.

> [Fury's Counsel]: No sir, we do not have 1970 before the jury. We, of course, withdraw that claim."
>
> The Court: "You don't think that they can withdraw it if they want to?"
>
> [Shakespeare's Counsel]: I am objecting to it your honor" (72a).

The Court permitted the withdrawal. In instructing the jury the court tried "to eliminate any dispute regarding 1970," (76a) which was accomplished in part by asking the jury, through a special verdict, to state the "damages sustained by the Plaintiff in each" year from *1971* to 1978, (87a). The first jury assigned damages in each year from *1970* to 1974 (18a).

The purpose of Rule 41(a)(2) is to prevent dismissals which unfairly affect the defending party. *Alamance Industries Inc.* v. *Filene's*, 291 F.2d 142, 146 (1st Cir.), cert. denied 368 U.S. 831 (1961); *Neiman-Marcus Co.* v. *Lait*, 14 F.R.D. 159 (1953); *Terry* v. *Pearlman*, 42 F.R.D. 335 (1967).

Neither lower court made an effort to decide if Shakespeare was prejudiced by partial withdrawal of Fury's claim, which would have been barred had there been damages in 1970. By permitting withdrawal of a claim for damages in 1970, and suppressing admissions of damage in 1970, the Court effectively took from the jury the question of whether or not there had been any damages in 1970. Shakespeare was prejudiced.

The withdrawal of the claim was made at trial. Shakespeare had no opportunity to adjust its trial strategy to respond to the withdrawal. Shakespeare was unfairly affected because Fury was permitted to conceal from the jury every indication of its admissions and claims of damage in 1970.

The Fifth Circuit sanctioned a significant departure from ordinary and accepted judicial practice. Its *sub silentio* holding on Rule 41(a)(2) is in conflict with the holding of the First Circuit in *Alamance Industries, Inc.* v. *Filene's, supra.* This Court should grant certiorari to resolve the conflict between the Circuits, to remedy the serious departure from accepted practice and to definitively interpret Rule 41(a)(2).

III. REFUSAL TO CONSIDER STATE CHOICE OF LAW RULES AND APPLICABLE FOREIGN LAW, TIMELY ASSERTED BEFORE RETRIAL, WHEN CONSIDERATION WAS PREVIOUSLY DENIED BECAUSE OF UNTIMELY NOTICE UNDER FEDERAL RULE OF CIVIL PROCEDURE 44.1, PRESENTS A SIGNIFICANT QUESTION OF FEDERAL LAW.

(A) Rejection of Japanese Law on Retrial Was a Misapplication of the "Law of the Case" Doctrine.

Shakespeare's September 11, 1974, notice of intent to raise an issue of foreign law was rejected as untimely (42a). The notice was part of a letter from Shakespeare's lawyer to Fury's lawyer summarizing the parties' agreement on applicable law as follows:

> "This will confirm our telephone conversation in which I told you that if a question of choice of law arose between New York and Florida, I believe that the New York law would be applicable. You indicated to me that you were in accord with this principle. I also mentioned to you that Japanese law might be applicable. Accordingly, I want to put you on notice, pursuant to Rule 44.1, that an issue of foreign law may be involved in this case."
>
> "The precise issue of Japanese law involved is the absence, under Japanese law, of a right to claim punitive damages" (61a).

In its April 21, 1975, Order on post-trial motions the Court said:

> "The defendant, through a motion to strike filed September 11, 1975 [sic], just eight days prior to the commencement of trial, and through a letter notice of the same date, first informed the Court and the plaintiff respectively of the possible application of Japanese law. This notice was not reasonable within the intendment of Federal Rule of Civil Procedure 41.1" (42a).

The District Court interpreted the stipulation as an agreement by Shakespeare to apply New York law on punitive damages (43a).

On the first appeal the Fifth Circuit refused to disturb this interpretation of the stipulation. The Court did not then decide the underlying question of whether Japanese law was properly applicable to this case (39a). Although this was a diversity action, it did not consider any state choice of law rules. The Trial Court was not explicitly directed to apply New York local law on punitive damages. Instead it was told that it "was not bound to follow a stipulation as to a question of law" (39a).

Two months before retrial Shakespeare filed written notice of its intent to raise Japanese law (R. 653). Fury did not question the timeliness of this notice.

Proofs were again offered to show that Japanese law did not permit punitive damages (48a-49a, 70a-71a). After trial, Shakespeare's choice of law position was again rejected. The Court found New York's choice of law rules "anomolous and unjust" and that the parties agreed to apply New York law on punitive damages. The Court held alternatively that Japanese law would not be applicable under New York choice of law rules (12a). "Law of the case" was *not* one of the reasons given by the District Court for rejection of Japanese law.

The Court of Appeals sanctioned the refusal to consider application of Japanese law saying:

> "In our prior opinion we did not expressly decide which body of law controlled punitive damages. However, we implicitly adopted New York law as determinative."

* * *

> At the retrial, the district court again held that the stipulation required the application of New York law to decide whether or not punitive damages were allowable. In doing so he correctly followed our opinion" (3a-4a).

Upholding the District Court's refusal to apply applicable foreign law on retrial was a misapplication of both Rule 44.1 and the law of the case doctrine.

Rule 44.1 was designed to prohibit unfair surprise or prejudice to a party in raising of issues of foreign law. See Committee Note of 1966 to Rule 44.1. "Prejudice" in this context means inability to address the issues of foreign law. Fury had over four years to address the issues of Japanese law. It was not unfairly surprised at retrial by reference to Japanese law.

Where an appellate Court

> "remands the case to the district court for further proceedings, new issues may be presented by amended pleadings not inconsistent with the judgment of the appellate court, if the mandate of the appellate court does not preclude amendment." 3 *Moore's Federal Practice* ¶ 15.11.

Defendants may be dismissed after remand to preserve jurisdiction. *Finn* v. *American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953). A new theory of recovery may be advanced after remand. See cases cited in 3 *Moore's Federal Practice* ¶ 15.11, notes 13 & 15. Fury was permitted to change its theory of the case and withdraw its claim for damages for 1970.

The case was remanded for a new trial "on all issues" to give Fury a chance to correct the defects in its case which made the first verdict unsupportable. Neither Fury, the District Court nor the Court of Appeals advanced a rationale for following inapplicable law because a since corrected defect led to the application of the wrong law at the first trial.

This Court should resolve the undecided issues of Federal law raised here.

(B) Proper Application of the "Law of the Case" Rule Would Not Permit Perpetration of Clear Error or Perpetuation of Manifest Injustice.

Law of the case is a rule of practice. *U.S.* v. *McClain*, 593 F.2d 658, 664 (5th Cir. 1979) *cert. denied* 444 US 918. It "is not an inexorable command, and must not be utilized to accomplish an obvious injustice." *Cochran* v. *M & M Transportation Co.*, 110 F.2d 519, 521 (1st Cir. 1940) The decision of the Court of Appeals in this case represents a significant departure from previous lower court cases on "law of the case."

Only those issues decided expressly or by necessary implication become "law of the case." *Hartford Life Ins. Co.* v. *Blincoe*, 225 U.S. 129, 136 (1921). The law of the case "does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided." *Connett* v. *City of Jerseyville*, 110 F.2d 1015, 1018 (7th Cir. 1940). A general remand does not preclude consideration of issues not squarely addressed on appeal. *Doran* v. *Petroleum Management Corp.*, 576 F.2d 91 (5th Cir. 1978).

The Fifth Circuit acknowledged that its first opinion did not "expressly" rule on the choice of law questions involving punitive damages (3a). A decision on applicable state choice of law was not necessary to decision of the first appeal in light of the holdings that rejection of the notice of foreign law as untimely was proper and that the notice of foreign law was an agreement to apply local state law.

Nevertheless, the Court of Appeals held that the law of the case required it to reject consideration of applicable state choice of law rules and foreign law. By extending the law of the case rule to preclude consideration of issues not previously determined, the Fifth Circuit departed significantly from established practice. Its holding should be reviewed. An important question of federal law is presented since the law of the case rule is involved in every case remanded for trial by a Court of Appeals.

The finding that Shakespeare agreed to apply New York local law on punitive damages was clear error. The letter setting forth the stipulation (61a) said that Shakespeare was urging application of *Japanese* law to the punitive damages question.

> "[S]tipulations should receive a fair and liberal construction, consistent with the apparent intention of the parties, the spirit of justice and the furtherance of fair trials upon the merits, rather than a narrow and technical one calculated to defeat the purposes of their making. A stipulation should be construed in light of the pleadings, and its terms should not be so construed to extend beyond that which a fair construction justifies." 73 Am.Jur.2d, *Stipulations* § 7.

On the second appeal, even Fury conceded that previous interpretation of the stipulation had been wrong, saying:

> "Under the parties' stipulation, the conflict law of New York would be applicable." (88a)

The continued misapplication of the parties stipulation resulted in a verdict against Shakespeare for $600,000 in punitive damages. The Alice-in-Wonderland interpretation of the stipulation and the Fifth Circuit's refusal to depart from it worked a manifest injustice.

> "[J]ustice is better than consistency' . . . [A court] must be free to determine whether the first decision was in error, and if so, whether a different result should be reached . . . Where, as here, a party to the action raises serious objections to the soundness of the first decision, the Court, in all but special circumstances should re-examine the first decision as a prerequisite to its implementation as the law of the case." *Wm. G. Roe & Co.* v. *Armour & Co.*, 414 F.2d 862, 867-68 (5th Cir. 1969) (Citations omitted). See also *Burkett* v. *Shell Oil Co.*, 487 F.2d 1308, 1313 n.1 (5th Cir. 1973).

Had there been no stipulation, the Court would have been obliged to apply Florida choice of law rules. *Day & Zimmer-*

man, Inc. v. *Challoner,* 423 U.S. 3 (1975). Florida looks to the place where the wrongful act occurred in determining applicable law. *Beasley* v. *Fairchild Hiller Corp.,* 401 F.2d 593, 596 (5th Cir. 1968); *Hopkins* v. *Lockheed Aircraft Corp.,* 201 S.2d 743, 752 (Fla. 1967) Since the interference complained of took place in Japan, where Ohmori manufactured and sold the reels, under Florida law, Japanese law would have governed the question of punitive damages.

The lower courts considered New York law to be the law of the forum by stipulation of the parties. New York follows the rule of "most significant contacts." *Babcock* v. *Jackson,* 240 N.Y.S.2d 743 (Ct. App. 1963). Under its choice of law rules, Japan would have been the jurisdiction with the most significant contact since the tortious conduct occurred there, the contract allegedly interfered with was entered into there, Ohmori was a Japanese National operating only in Japan and the breach or other interference caused by Shakespeare could have occurred only in Japan. New York would have applied Japanese law on punitive damages.

The lower courts evaded their obligation to apply state choice of law rules in a diversity case by obdurately refusing to reconsider their manifestly erroneous interpretation of a stipulation of law not binding on them. Consideration of the law properly applicable would have significantly changed the result. By refusing to reconsider its previous decision when serious objections were raised to its soundness, the Court departed significantly from accepted practice.

IV. THE FAILURE OF THE COURT OF APPEALS TO APPLY APPLICABLE STATE LAW IN A DIVERSITY CASE AMOUNTED TO A REFUSAL TO FOLLOW THE DIRECTION OF *DAY & ZIMMERMAN, INC.* v. *CHALLONER,* 423 U.S. 3 (1975).

(A) The Court of Appeals Failed to Conform Its Decision to Intervening, Controlling State Law.

In its September 8, 1980, Opinion the Court of Appeals purported to apply New York law as the law applicable in this

diversity action.[2] On May 2, 1980, Shakespeare called the attention of the Court to *Guard-Life Corp.* v. *S. Parker Hardware Mfg. Corp.*, 428 N.Y.S.2d 628 (1980), the most recent pronouncement of New York's highest Court on the law of tortious interference. (63a)

Guard-Life unequivocally adopted the Restatement (second) view of the tort of interference. 426 N.Y.S.2d of 634. It established that New York recognizes no distinction between "inducement to breach" and "interference with a contract."

Note c to the Restatement (Second) of Torts, § 766 (entitled "Intentional Interference with Performance of Contract by Third Person") says, in part:

> "The liability for inducing breach of contract is now regarded as but one instance, rather than the exclusive limit of protection against improper interference in business relations."

Note k to the same section says, in part:

> ". . . It is not necessary to show that the third party was induced to break the contract."

Prosser on Torts, 4th Edition, § 129, says:

> "Notwithstanding the name of 'inducing breach of contract' which has been conferred on the tort since *Lumley* v. *Gye* [118 Eng. Rep. 749, 1853], it does not require inducement to action as a means or complete repudiation as a result."

Inducing a complete breach is only one of many ways in which a contract can be interfered with. It is not the *sine qua non* of the tort. See *Goodall* v. *Columbia Ventures*, 374 F. Supp. 1324, 1332 (S.D.N.Y. 1974); *Dior* v. *Milton*, 155 N.Y.S.2d 443

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[2] Even if the Court were not obligated by *Day & Zimmerman Inc.* v. *Challoner* to apply New York law, its acceptance of a stipulation to apply New York law prevented it from frustrating the expectations of the parties by ignoring the stipulation and applying some other law. 73 Am Jr 2d, Stipulations § 7.

(Sup. Ct. 1956), *aff'd* 156 N.Y.S.2d 996 (1956); *Morris* v. *Blume*, 55 N.Y.S.2d 196, 199 (Sup. Ct. 1945); and *Sacks* v. *Stewart*, 427 N.Y.S.2d 20, 22 (App. Div. 1980).

The Fifth Circuit's September 8 decision made no mention of *Guard-Life*. The decision was based on a distinction between "inducement to breach" and "tortious interference." The Court said that:

> "Until there was a breach of the Fury-Ohmori contract, Fury could not sue Shakespeare for inducing its breach."

And:

> "Inducing another to break a contract does not become a legal wrong upon which an action may be based until damages are suffered as a result, and that occurs only when the breach happens."

The Court noted *Goodall* v. *Columbia Ventures*, *Morris* v. *Blume*, *Dior* v. *Milton* and *Prosser on Torts* but distinguished them all saying:

> "That, however, is not the claim made here. Fury did not seek damages because Shakespeare made performance of its contract more difficult. It sued because Shakespeare induced Ohmori to break that contract."
>
> * * *
>
> "It is, therefore, not decisive that Fury may have known in August, 1970, that Shakespeare might be violating its exclusive distributorship, for that would not have given Fury a claim for inducing the breach of the contract to supply reels, the basis on which it sought damages."

The Fifth Circuit also said that the trial court's

> "instructions as a whole . . . adequately conveyed that the plaintiff was suing for inducement to breach, not for making performance more difficult" (8a).

Even if the Court were right about the nature of Fury's claim, its first decision rested on a distinction between "in-

ducement to breach" and "interference with contract" not drawn by New York courts.

In denying the application for rehearing, the Court described *Guard-Life* as: "A decision apparently reported after the Opinion in this case was prepared . . ." (9a).

The Court acknowledged that the tort on which Fury sued and the tort which Shakespeare said was barred were the same no matter what name was applied. However, it did not reconsider its previous ruling which said damages to Fury in 1970 as a result of Shakespeare's interference were irrelevant.

The Court was obliged to consider and follow applicable state law even if it became applicable while the appeal was pending. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Having previously refused to consider whether interference in 1970 barred the claim because the interference did not cause a "breach," the court was obliged to examine the case in light of unequivocal, recent and controlling authority holding that "breach" was not an element of the tort sued on. The Fifth Circuit's failure to follow *Guard-Life, supra,* was contrary to *Day & Zimmerman, Inc.* v. *Challoner, supra* and *Vandenmark* v. *Owens-Illinois Glass Co., supra.* Certiorari should be granted to command adherence to this Court's precedents.

(B) The Court Refused to Follow Applicable Law Because It Was Not Satisfied with the Result that Would Be Reached.

In *Day & Zimmerman, Inc.* v. *Challoner,* 512 F.2d 77, 82 (5th Cir. 1975) the Fifth Circuit openly refused to apply state choice of law rules in a diversity case because it was not happy with the result that would be achieved.

This Court reversed preemptorily, saying:

"A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which

> may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmerman, Inc.* v. *Challoner* 423 U.S. 3, 4 (1975).

In this case, both the District and Circuit Courts expressed dissatisfaction with New York law before making holdings directly at odds with controlling state precedent. Although state law was not openly rejected as it was in *Day & Zimmerman*, "the fragrance of the rose" is the same. Certiorari should be granted so that the Fifth Circuit can be told again to conform its decisions to *Day & Zimmerman*, supra, and *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) by adhering to state law in diversity cases.

The September 8 opinion held that "breach" of contract by the non-suing third party was an element of the tort sued on by Fury. Under New York law, the repudiation of an existing contract is a "breach" even if the failure to perform under the contract does not occur for some time after the repudiation. *Long Island Ry. Co.* v. *Northville Industries Corp.*, 393 N.Y.S.2d 925, 930 (Ct. App. 1977); *Hartzell* v. *Burdick*, 398 N.Y.S.2d 649 (1977); *Mignon* v. *Tuller Fabrics Corp.*, 148 N.Y.S.2d 605 (App. Div. 1956). Ohmori's June 10, 1970, agreement with Shakespeare repudiated the contract with Fury. Ohmori agreed to stop dealing with Fury within a year. Although this repudiation was a "breach" under New York law, the Court of Appeals refused to hold that Fury's suit for inducing a breach was barred by the statute of limitations. The Court did not discuss or distinguish New York cases holding anticipatory breaches of contract actionable. The Court instead criticized the doctrine of anticipatory breach saying:

> "A party who could be tempted to breach one contract might change his mind and breach another."

and that

> "Ohmori breached its Fury contract for purposes of this action only when in response to Shakespeare's instigation it

> failed to deliver reels. . . Ohmori signing a contract with Shakespeare was not, per se, an anticipatory breach of the Ohmori-Fury contract" (5a-6a).

That the Court of Appeals thought it strange that New York would permit suit against a party who has breached his contract but might yet "change his mind and breach another" is not a reason to ignore state law controlling under *Day & Zimmerman Inc.* v. *Challoner*, 423 U.S. 3 (1975). Certiorari should be granted. The Fifth Circuit should be told to apply the law that governs the case whether it finds it strange or not.

Fury's contract was an exclusive distributorship contract. Inducing a breach of the exclusivity provision by Ohmori was actionable.

Fury's witnesses testified that in 1970 Shakespeare interfered with its exclusive distributorship rights by marketing its reels, which could only be obtained from Ohmori (64a-66a).

Fury's only customer told it in 1970 that no more reels would be purchased from Fury because of Shakespeare's marketing of the supposedly exclusive reel at a tackle show. Fury was compelled to disadvantageously renegotiate its contract with its only customer because of Shakespeare's acts. Fury was also compelled to renegotiate its contract with Ohmori. As a result of these renegotiations, Fury sold fewer reels and made less profit (66a).

Hannigan v. *Sears, Roebuck & Co.*, 410 F.2d 285 (7th Cir. 1969) a case described by the Fifth Circuit as "very similar" (37a) and by Fury as "on all fours," (88a) held such interference with contractual rights actionable.

Sears Roebuck had applied economic pressure to coerce third parties into modifying their contractual arrangements. The Seventh Circuit said:

> "To us, there is no legally significant distinction between unabashed third party conduct which causes one party to outrightly repudiate and breach its contract with another

> and subtle third party conduct which achieves essentially the same result through the equally questionable means of coercing a contractual modification. Both approaches are equally tortious in nature and similarly interfere with the contractual relationship of others." 410 F.2d at 291.

New York law is to the same effect. See *Goodall* v. *Columbia Ventures, Inc.*, 374 F. Supp. 1324, 1332 (S.D.N.Y. 1974); *Bryce* v. *Wilde*, 333 N.Y.S.2d 614, 616 (App. Div.) *aff'd* 340 N.Y.S.2d 185 (1972); *Dior* v. *Milton*, 155 N.Y.S.2d 443 (S.Ct. 1956) aff'd 156 N.Y.S.2d 996 (1956). Yet the Court of Appeals refused to consider evidence of interference with the exclusivity aspects of Fury's contract as "breach" or damages. It refused to consider Shakespeare's claims that the jury was not properly instructed as to what "damages" where actionable and as to the nature of the tort. If the jury was "adequately" instructed that Fury was suing for the inducement of a breach of contract, it was inadequately instructed on the true nature of the tort as defined in *Guard-Life, supra.*

The Court refused to consider "that Fury may have known in August, 1970, that Shakespeare might be violating its exclusive distributorship" because "that would not have given Fury a claim for inducing a breach of the contract to supply reels, the basis on which it sought damages." Neither lower court cited any authority (because there is none) allowing Fury to avoid the statute of limitations by withdrawing its claim for damages in 1970 or by suing for only inducement of some breaches of the contract with Ohmori. Under New York law, Fury's characterization of its claim was irrelevant. *Sacks* v. *Stewart*, 427 N.Y.S.2d 20, 22 (App. Div. 1980). *Mishkin* v. *Dormer*, 395 N.Y.S.2d 452 (App. Div. 1977); *Mack* v. *Clairol, Inc*, 415 N.Y.S.2d 16 (App. Div. 1979). The Court's studied refusal to apply controlling New York law was also a refusal to obey the command of *Day & Zimmerman, Inc.* v. *Challoner, supra.*

New York was, by stipulation, the law of the forum. The situation was the same as it would have been if Fury had moved for a change of venue to New York. *Carson* v. *U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970); *Brown Machine Co.* v. *Merrow*, 411 F. Supp. 1162 (Conn. 1976); *Haire* v. *Miller*, 447 F. Supp. 57, 62 (N.D. Miss. 1977).

New York's choice of law rules apply the law of the jurisdiction with the strongest interest in the *particular issue* to be decided. New York sees no anomoly in applying one jurisdiction's law to one issue in a case and another jurisdiction's law to a separate issue. *Babcock* v. *Jackson*, 240 N.Y.S.2d 743, 752 (Ct. App. 1963).

After the first trial the District Court found this rule not to his liking, saying:

> "In order to apply Japanese law on the substantive issue of punitive damages, it would be necessary to hold the appropriate choice of law for the whole cause of action as Japanese. This was neither argued or supported by the defendant. The Court concludes that to recognize Japanese law on a single issue which is favorable to the proponent of that foreign law and not apply Japanese law to other substantive issues which may not be so favorable would be anomalous." (43a)

The Court of Appeals did not discuss any choice of law rules.

After retrial, Judge Atkins again refused to apply Japanese law on punitive damages. This time he recognized that "New York conflicts of law principles provide for the use of the law of the jurisdiction with the strongest interest" (12a). However, he also said that:

> "[T]o recognize Japanese law on the single issue of punitive damages would be anomalous and unjust, considering that other Japanese law might be less favorable to SHAKESPEARE" (12a).

Judge Atkins offered other reasons for refusing to apply New York law, including his interpretation of the parties stipulation to be an agreement to apply "New York law of the tort of inducement to breach . . ." Judge Atkins also found, without citation of any authority, that under New York's choice of law rules Japanese law would not govern punitive damages.

The Court of Appeals refused to consider New York choice of law rules or whether they required application of Japanese law on punitive damages. It sanctioned the District Court's refusal to apply applicable state law because it did not commend itself to the Court. Certiorari should be granted. The lower courts should be directed to apply state choice of law rules in diversity cases even if the result is "anamolous."

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

FURY IMPORTS, INC.,
Plaintiff-Appellee,

v.

SHAKESPEARE COMPANY,
Defendant-Appellant.

No. 78-2962.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1980.

Before RUBIN and POLITZ, Circuit Judges, and POINTER*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

This case comes before us for the second time. *See Fury Imports, Inc.* v. *Shakespeare Co.*, 544 F.2d 1376 (5th Cir. 1977). We need not again recite the facts there set forth at length, but we give a summary sufficient to clarify the issues now before us.

William Ciaccia designed a fishing reel called the "Spinmaster" and formed a corporation, Fury Imports, to market it. Fury contracted with a Japanese manufacturer, Omori, to produce the reels. Omori was to sell the reels to its trading agent, Shinei Company. Shinei would in turn sell reels to Fury, which would be the exclusive distributor in the Western Hemisphere.

For the 1970 retail season, Fury was required to and did order 150,000 reels although a slightly smaller number was actually delivered. In June, 1980 Omori entered into a contract with Shakespeare, a competitor of Fury, agreeing to stop making Spinmaster reels for Fury within one year and to start

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* District Judge of the Northern District of Alabama sitting by designation.

making a similar reel for Shakespeare. The Shakespeare-Omori contract was not literally carried out, for Omori continued to make and deliver Spinmaster reels to Fury in 1971 and 1972, albeit in decreasing numbers. In 1973, Omori informed Fury that it would stop making Spinmaster reels. Fury filed this suit against Shakespeare on January 15, 1974.

The first appeal followed a jury trial, which resulted in a verdict for Fury. Shakespeare successfully moved for a judgment notwithstanding the verdict. We reversed the district court's judgment but remanded for a new trial on all issues including the defense that the statute of limitations had run on Fury's claim. With regard to that issue we said:

> If the district court were to decide that the New York statute of limitation should have been applied, it will, of course, have to decide when Fury's cause of action accrued under New York law, and whether any reason exists for tolling the statute. Although the parties address much argument to us on these issues, we think it would be premature to pass on them at this point. This is especially so because there may well be issues of fact upon which a jury should pass as to just when the first breach occurred. . . . We therefore do not rule on these issues.

554 F.2d at 1390.

The present appeal from the second jury verdict, awarding both compensatory and punitive damages, involves primarily two questions: (1) whether New York law or Japanese law governs the question of punitive damages and (2) when the statute of limitations began to run (that is, did it begin to run in June 1970, when the Omori-Shakespeare contract was made, or at a later time)?

I. Punitive Damages.

[1] Prior to the first trial, the parties entered into a stipulation that New York law would generally apply. The parties disagree over whether that stipulation extended to the issue of punitive damages.

We need not linger over the merits of this dispute since it has already been resolved. In our prior opinion we did not expressly decide which body of law controlled punitive damages. However, we implicitly adopted New York law as determinative. We said:

> The district court, stating that under New York law punitive damages may be recovered "where the wrong complained of is morally culpable, or . . . actuated by evil and reprehensible motives or a desire to harm the plaintiff, or where an act is so reckless that its carelessness indicates a heedless disregard of the rights of others," App. 60, nonetheless overturned the jury's verdict. On the evidence in this case, we think this was error.

554 F.2d at 1388. We then proceeded to discuss the New York cases, and concluded that the district court "erred in setting aside the jury award as to punitive damages," saying:

> Although we cannot be certain what the New York courts would do in a case like this, we do know that federal courts applying very similar law from other states have found the evidence sufficient to support awards of punitive damages in very similar inducement-to-breach cases. *Hannigan v. Sears, Roebuck and Co.*, 410 F.2d 285, 293-94 (7th Cir. 1969) *cert. denied*, 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969); *ABC-Paramount Records, Inc.* v. *Topps Record Distributing Co.*, 374 F.2d 455, 462-63 (5th Cir. 1967). We *think the same result should obtain under New York law here.*

554 F.2d at 1389 (emphasis supplied).

At the retrial, the district court again held that the stipulation required the application of New York law to decide whether or not punitive damages were allowable. In doing so he correctly followed our opinion. *See Schwartz v. NMS Industries, Inc.*, 575 F.2d 553, 554 (5th Cir. 1978).

II. Statute of Limitations.

[2] The parties agree that the New York statute of limitations controls. Under New York law, the period of limitations for tortious interference with a contract is three years. N.Y. Civ. Prac. § 214(4); *Von Ludwig* v. *Schiano*, 23 App.Div.2d 789, 258 N.Y.S.2d 661 (1965); *see Rolnick* v. *Rolnick*, 29 App.Div.2d 987, 290 N.Y.S.2d 111 (1968), *aff'd*, 24 N.Y.2d 805, 248 N.E.2d 442, 300 N.Y.S.2d 586 (1969); *Hanrihan* v. *Parker*, 19 Misc. 2d 467, 192 N.Y.S.2d 2 (1959). Whether or not it has run depends on when the cause of action accrued. The jury by special verdict found that "the first breach by Omori proximately caused by defendant Shakespeare Co.'s inducement" occurred after January 15, 1971, thus within three years of the date Fury filed this suit. There was sufficient evidence to support this finding.

Shakespeare nevertheless invites us to accept the simplistic idea that, because the eventual breach of Omori's contract with Fury arose "out of a meeting in Japan on June 10, 1970, between officials of Shakespeare's wholly-owned overseas subsidiary . . . and . . . [the] president of the Omori company," 554 F.2d at 1378, the cause of action accrued then as a matter of law. But neither life nor law is, fortunately, so simple. On that date, Fury could not have sued Omori for breach of contract for Omori had not yet failed in one iota of its contract obligations. Until there was a breach of the Fury-Omori contract, Fury could not sue Shakespeare for inducing its breach. As a recent opinion of the New York Court of Appeals states:

> In order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of that contract by the other party (*Israel* v. *Wood Dolson Co.* 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 5, 134 N.E.2d 97, 99; *Campbell* v. *Gates,* 236 N.Y. 457, 141 N.E. 914; *Lamb* v. *Cheney & Son,* 227 N.Y. 418, 125 N.E. 817; 32 N.Y.Jur., Interference, § 20), a situation not here present.

Jack L. Inselman & Co. v. *FNB Financial Co.,* 41 N.Y.2d 1078, 1080, 364 N.E.2d 1119, 1120, 396 N.Y.S.2d 347, 349 (1977); *accord, Torrey Delivery, Inc.* v. *Chautauqua Truck Sales and Service, Inc.,* 47 App.Div. 279, 366 N.Y.S.2d 506 (1975).

Of course expressions can be found in New York opinions addressing another point, that "[t]he act of inducing the breach is the wrong . . ." *Conmar Products Corp.* v. *Universal Slide Fastener Co.,* 172 F.2d 150, 156 (2d Cir. 1949). But inducing another to break a contract does not become a legal wrong upon which an action may be based until damage is suffered as a result, and that occurs only when the breach happens. *See Israel* v. *Wood Dolson Co.,* 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 5 (1956). Shakespeare cites as authority to the contrary *Hagan Corp.* v. *Medical Society of New York,* 198 Misc. 207, 96 N.Y.S.2d 286 (Sup. Ct. 1950), *aff'd* 279 App.Div. 1058, 113 N.Y.S.2d 282 (App. Div. 1952), and *Hanrihan* v. *Parker,* 19 Misc. 2d 467, 192 N.Y.S.2d 2(Sup. Ct. 1959), but a closer reading reveals that in both of those cases there had been a breach of the contract prior to the date on which the court held the statute of limitations began to run.

[3] A party who could be tempted to breach one contract might change his mind and breach another. Omori might have disregarded its June 10th compact with Shakespeare and continued to deliver Spinmaster reels to Fury for ten years. If so, Fury would have had no cause of action against Shakespeare (or, for that matter, Omori). Indeed, with Shakespeare's

apparent consent (because it did not need all of Omori's production), something akin to that happened: Omori did not perform the Shakespeare contract according to its literal terms since it did not terminate all shipments to Fury on the scheduled date. Omori breached its Fury contract for purposes of this action only when in response to Shakespeare's instigation it failed to deliver reels.[1] For the same reason, Omori's signing a contract with Shakespeare was not, per se, an anticipatory breach of the Omori-Fury contract.

In some instances, New York permits a claim for interference with contractual relations not constituting inducement to breach. Thus, a federal district court in New York recently said:

> It is not necessary, as plaintiff erroneously argues, to allege a breach of contract in order to state a valid claim for interference with contractual relations. The tort extends to cases in which performance of the contract is rendered more difficult or a party's enjoyment of the contract's benefits is lessened by the wrongdoer's actions. In New York, "an unlawful interference with a person in the performance of his contract with a third party is just as much a legal wrong as is an unlawful inducement of a breach of that contract by the third party."

Goodall v. *Columbia Ventures, Inc.*, 374 F. Supp. 1324, 1332 (S.D.N.Y. 1974) (quoting *Morris* v. *Blume*, 55 N.Y.S.2d 196, 199 (Sup. Ct.), *aff'd*, 269 App. Div. 832, 56 N.Y.S.2d 414

1. Omori did not deliver all the reels that Fury ordered for 1970. There was, however, sufficient evidence that this failure was due to production problems, rather than to Shakespeare's promptings, to allow the jury to find, as it did, that there was no breach induced by Shakespeare in 1970. As we said in our prior opinion, "Shakespeare can be held liable only for those breaches by Omori that it induced," 554 F.2d at 1388 n.16, and the trial judge so instructed the jury. The limitations period did not begin to run until Shakespeare's liability began.

(App. Div. 1945); see *Dior* v. *Milton,* 9 Misc. 2d 425, 155 N.Y.S.2d 443, 460 (Sup. Ct.), *aff'd,* 2 A.D.2d 878, 156 N.Y.S.2d 996 (App.Div. 1956); W. Prosser, Handbook of the Law of Torts 935 (4th ed. 1971).

[4] That, however, is not the type of claim made here. Fury did not seek damages because Shakespeare made performance of its contract more difficult. It sued because Shakespeare induced Omori to break that contract. The amendment to Fury's complaint adding the claim now relevant alleged that Shakespeare "purposely designed to interfere with the contractual rights of plaintiff and ultimately to put the plaintiff out of business," and sought damages "for tortuous [sic] interference of the [sic] contractual rights." Fury's accompanying memorandum of law supporting its amendment makes clear that it sought damages for inducing Omori to cancel the contract, not for making performance more difficult. The memorandum alleges that Shakespeare's actions had the effect of "canceling out the plaintiff's contract with the Japanese factory that manufactured these Spinmaster reels." It is, therefore, not decisive that Fury may have known in August, 1970, that Shakespeare might be violating its exclusive distributorship, for that would not have given Fury a claim for inducing a breach of the contract to supply reels, the basis on which it sought damages.[2]

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2. The judge instructed the jury at one point: The breach of the contract, however, does not have to be a breach in the legal sense. Rather, the tort extends to situations in which the performance of the contract is rendered more difficult. Where a party's enjoyment of the contract's benefit is lessened by the wrongdoer's actions. Nevertheless, since another element in the plaintiff's case is damages, the cause of action cannot accrue until the plaintiff has suffered damages for which he may be compensated.

(Footnote continued on following page.)

[5] It was not reversible error for the trial court to exclude from the second trial as evidence bearing on when the claim arose the fact that Fury in the first trial claimed damages for 1970. Even if this legal theory of Fury's counsel was evidence having a tendency to make it more probable or less probable that the claim indeed arose before January 15, 1971, and so relevant under rule 401 of the Federal Rules of Evidence, the trial judge was within his discretion in excluding it under rule 403, which allows the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See, e.g., United States* v. *Frick,* 588 F.2d 531, 537 (5th Cir. 1979); *United States* v. *McDaniel,* 574 F.2d 1224, 1227 (5th Cir. 1978).

Shakespeare briefly raises other points of error, but they are without merit. For these reasons, the judgment of the district court if AFFIRMED.

(Footnote continued from preceding page.)

His instructions as a whole, however, adequately convey that the plaintiff was suing for inducement to breach, not for making performance more difficult. In any case, even if this instruction is erroneous, it is erroneous in Shakespeare's favor, since it could possibly have persuaded the jury to find that the statute of limitations began to run even before there was an actual breach. Since the jury found for Fury on the limitations point, any error was harmless.

FURY IMPORTS, INC., a New York Corporation, Plaintiff-Appellee,

v.

SHAKESPEARE COMPANY, a Delaware Corporation, Defendant-Appellant.

No. 78-2962.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1980.

* * * * *

Before RUBIN and POLITZ, Circuit Judges, and POINTER*, District Judge.

ON PETITION FOR REHEARING

PER CURIAM:

The application for rehearing directs our attention to *Guard-Life Corp.* v. *S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980), a decision apparently reported after the opinion in this case was prepared, and urges that the *Guard-Life* opinion establishes a rule of New York law that would require a different analysis from the one made in our opinion.

It is unnecessary to set forth all of the facts and issues in *Guard-Life*. The court there considered a claim for tortious interference with contract rights, but did not deal with the question of when the statute of limitations on such a claim commences. Although it implies, apparently contrary to in-

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* District Judge of Northern District of Alabama, sitting by designation.

dications in some of the New York cases cited in our opinion, that New York does not recognize a cause of action for interference with contractual relations not constituting inducement to breach, as distinguished from a cause of action for inducing contractual breach, it does so under a rubric that apparently embraces both concepts by adopting this definition of the tort from the Restatement (Second) of Torts:

> intentionally interfering with a contract or a prospective contractual relation of another . . .

Restatement (Second) of Torts § 766 (1977).

If we apply this concept to the present case, we come to the same result. The cause of action for "intentionally interfering with a contract" (sometimes called tortious inducement to breach of contract in the prior New York cases, decided before the Second Restatement was adopted in 1977) accrues only when damage is suffered. A change of name alters neither the fragrance of the rose nor the time when a cause of action accrues for a tort whose name alone has been changed.

For these reasons, the application for rehearing is DENIED.

UNITED STATES DISTRICT COURT
Southern District of Florida

Case No.—Civ-CA

Filed August 11, 1978

FURY IMPORTS, INC.,

Plaintiff,

vs.

SHAKESPEARE COMPANY,

Defendant.

Defendant, SHAKESPEARE COMPANY, moves for a judgment notwithstanding the verdict on the ground that Plaintiff's (FURY IMPORTS, INC.) claim is barred by the statute of limitations. SHAKESPEARE also argues that the award of punitive damages is barred by the applicable law.

Statute of Limitations:

Both parties agree that the applicable statute of limitations is the three year limit provided by New York law, since Florida law "borrows" statutes of limitation in certain actions. See F.S.A. § 95.10. The parties, however, disagree as to when the cause of action arose.

The tort of inducement to breach a contract arises under New York law when the breach and damage occurs. *Israel* v. *Wood Dolson Co., Inc.*, 1 N.Y.2d 116, 134 N.E.2d 97, 157 N.Y.S.2d 1 (1956). The jury was instructed on the statute of limitations defense and asked in the special verdict form whether the first breach occurred before or after January 15, 1971, the date three years prior to the filing of the action. The court did consider the statute of limitations defense and submitted the relevant factual issues to the jury. The jury determined that the breach giving rise to the cause of action occurred less than three years prior to the filing of this action, and the court feels that this factual determination is one about which reasonable persons could differ. The cause was therefore not barred by the applicable statute of limitations.

Punitive Damages:

SHAKESPEARE argues that the law of Japan applies to bar the granting of punitive damages since the parties have agreed to use New York law, and New York conflicts of law principles provide for the use of the law of the jurisdiction with the strongest interest.

This Court has previously stated that to recognize Japanese law on the single issue of punitive damages would be anomalous and unjust, considering that other Japanese law might be less favorable to SHAKESPEARE. The Court interprets the vague stipulation of the parties as an agreement to apply New York law of the tort of inducement to breach and damages, and punitive damages are proper under that law.

Even if New York's choice of law rules are applicable, that law would allow the granting of punitive damages. Under a balancing of the interests approach, Japan would have no interests to protect. Neither of the parties is a Japanese citizen and the parties have agreed that the cause of action arose, if at all, under New York law. No Japanese citizen will be forced to pay these punitive damages and therefore, Japan's interest in protecting its citizens from punitive damage awards is not infringed or involved through application of New York law. This action is transitory and Japan has no interest in barring punitive damages. In contrast, New York has an interest in providing punitive damages since a New York citizen has been injured.

The Defendant SHAKESPEARE'S motion for judgment N.O.V. is DENIED. SHAKESPEARE'S motion for oral argument concerning this motion is also DENIED.

DONE AND ORDERED at Miami, Florida, this 10th day of August, 1978.

/s/ C. CLYDE ATKINS
Chief United States District Judge

FURY IMPORTS, INC., Plaintiff-Appellant Cross Appellee,

v.

SHAKESPEARE COMPANY, Defendant-Appellee Cross Appellant.

No. 75-2421.

United States Court of Appeals,
Fifth Circuit.

June 24, 1977.

Rehearing Denied Aug. 22, 1977.

Before COLEMAN, MORGAN and HILL, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

In this diversity suit for tortious inducement to breach a contract, plaintiff Fury Imports, Inc. appeals from a judgment notwithstanding the verdict entered in favor of defendant Shakespeare Company setting aside a jury verdict of $2,946,872.35. Defendant cross-appeals. We reverse and remand for a new trial.

I. FACTS AND PROCEEDINGS BELOW.

Although many of the facts and inferences to be drawn from them are hotly disputed, the bare bones of this case are as follows. William Ciaccia designed a new fishing reel called the "Spinmaster" and, in 1969, he incorporated Fury Imports in New York to market it. On December 15, 1969 Fury entered a three-party contract with a Japanese manufacturing company, Omori, and its trading agent, Shinei Company. Under this contract, Omori was to produce the reels. Fury was to purchase the reels from Omori through Shinei, which was to act as Omori's distributor. The contract provided that Fury would have exclusive distributorship rights for the reel in the Western Hemisphere, Omori in Japan, and Shinei in the rest of the world.

Under the contract, Fury and Shinei were to place orders for an aggregate of at least 150,000 reels during the first year of the contract.[1] The period for which the contract was to be in effect was set forth in the following paragraph:

> This agreement shall remain in effect for a period of one year from the date hereof and shall continue in effect from year to year thereafter, provided that Fury and/or Shinei shall place orders for at least 150,000 additional units of the products during the first year hereof or any renewal year, as the case may be, for delivery during the succeeding year.

App. 1089. It is not disputed that Fury did, in fact, order 150,000 reels from Omori, through Shinei, during the first year of the contract. Something less than this number was actually delivered to Fury for the 1970 retail season.

Fury was not the only company for which Omori manufactured fishing reels. Since 1963, it also had made reels for the Shakespeare Company, a large sporting goods company incorporated in Delaware. Fury and Shakespeare were competitors in at least some American markets to sell fishing reels.

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1. The contract states:

> Fury and, with respect to sales under Paragraph 'THIRD' hereof, Shinei shall place orders with Ohmori for such quantities as in the discretion of Fury and Shinei each may require from time to time. Fury and Shinei shall place orders for an aggregate of at least 140,000 of the products during the first year hereof. The purchase price, terms of payment terms of shipment and other terms of sale shall be mutually agreed upon by Ohmori and Fury, or by Ohmori and Shinei with respect to sales under Paragraph 'THIRD' hereof, as set forth in each separate confirmed purchase order or sales order.

App. 1088-89. At about the same time Fury entered this contract with Omori, it entered a contract with Southern Tackle Distributors, a Florida corporation, under which Southern agreed to buy 150,000 Spinmaster reels per year from Fury.

There was evidence that Omori experienced financial difficulty in 1969-70, although the cause of that difficulty was disputed.

This case arises out of a meeting in Japan on June 10, 1970 between officials of Shakespeare's wholly-owned overseas subsidiary, Noris-Shakespeare, and Mr. Omori, president of the Omori company. At this meeting Shakespeare and the Omori company entered an agreement by which Shakespeare bought one-sixth of the stock in Omori for about $25,000 and was given the right to place a Shakespeare representative on Omori's board of directors. Shakespeare also made a $200,000 interest-free loan to the Omori company. The critical portion of this agreement, as far as Fury is concerned, was a provision that Omori would stop making Spinmaster reels for Fury within one year and would start making a similar reel for Shakespeare.[2]

In the years after 1969-70, Omori delivered fewer and fewer reels to Fury. Finally, in 1973, Omori informed Fury that it would no longer make any Spinmaster reels at all for it.

On January 15, 1974 Fury filed this suit against Shakespeare, alleging that Shakespeare had tortiously induced Omori to breach its 1969 contract with Fury.[3] The theory of Fury's

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2. The agreement provided:
Omori currently manufactures a family of reels for the Japanese export company Shinei under the brand 'Diamond Spinmaster'. It was agreed upon that within a year from now Omori will stop further supplies to this outlet and give up the production of these reels. To fill a possible production gap, the U.S. Shakespeare company and Omori will start immediately to create, design and develop a most up-to-date series of fishing reels similar to the current Diamond Spinmaster to be distributed worldwide by NST.
App. 1030-31.

3. The complaint as originally brought was against Shakespeare and Southern Tackle Distributors for an accounting on allegations that Shakespeare had bought Spinmaster reels directly from Omori and

(Footnote continued on following page.)

case was that Shakespeare had bought into Omori and made it a sizeable interest-free loan on the condition that Omori would quit making Spinmaster reels for Fury, with the purpose of eliminating Fury as a competitor to Shakespeare in the market to sell fishing reels. Fury sought compensatory and punitive damages.

Shakespeare's trial defense had two main prongs. First, it claimed that in the years after 1970 there was no contract in existence between Fury and Omori, so that it could not have induced any breach. This claim, in turn, rested on the theory that the Omori-Fury contract had not been renewed for the years after 1970. Shakespeare's second line of defense was that its purpose for buying into Omori, making it the loan, and requiring that Omori stop supplying reels to Fury, was to save Omori from bankruptcy and preserve it as a steady supplier of reels to Shakespeare. This line of defense was put under variations on the "privilege" or "justification" defense to an inducement-to-breach suit.

The ease was tried to a jury under an unwritten stipulation by the parties that New York law would apply. The jury returned a special verdict, printed here in the margin.[4] After the

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(Footnote continued from preceding page.)

sold them to Southern, in violation of Fury's exclusive distributorship rights under the Omori Fury contract. Fury amended the complaint to include the tortious inducement count after discovery unearthed the tems of the June 10, 1970 agreement between Omori and Shakespeare. Southern was dismissed as a defendant, a ruling that Fury does not appeal. Neither do we have before us any questions concerning the action for accounting against Shakespeare.

4.

1. Did the defendant Shakespeare know that the contract among the plaintiff, Ohmori Corporation and Shinei Corporation dated December 15, 1969, was in full force and effect in June, 1970?

Yes X No ____

(Footnote continued on following page.)

verdict was returned, Shakespeare, which had moved for directed verdicts at the close of plaintiff's evidence and at the

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(Footnote continued from preceding page.)

2. Was the contract extended through the year 1971 by the placing of orders for that year with the Ohmori Corporation for at least 150,000 units of the spinning reel in question?

Yes X No ____

3. Was the contract extended for the year 1972 by the placing of orders for that year with the Ohmori Corporation for 150,000 units of the spinning reel in question?

Yes X No ____

4. Was the contract extended for the year 1973 by the placing of orders for that year with the Ohmori Corproation for 150,000 units of the spinning reel in question?

Yes X No ____

5. Did the Ohmori Corporation exercise a lawful right by refusing to manufacture spinning reels for the plaintiff by reason of the failure of the plaintiff to comply with the terms of the contract?

Yes ____ No X

6. Did the Ohmori Corporation breach its contract with the plaintiff by wrongfully refusing to manufacture the spinning reels in question for the years in which the contract was in full force and effect?

Yes X No ____

7. If your answer to Finding 6 above is yes, was the breach by the Ohmori Corporation of the said contract proximately caused by the defendant, Shakespeare Company, inducing the Ohmori Corporation to refuse to manufacture the reels?

Yes X No ____

8. If your answer to Finding 7 above is yes, was the defendant, Shakespeare Company justified in inducing the breach of contract?

Yes X No ____

(Footnote continued on following page.)

close of all the evidence, moved for judgment notwithstanding the verdict on a number of grounds.

The district court granted Shakespeare's motion in a written order on the grounds (1) that the evidence did not establish the existence of a contract between Fury and Omori for the years 1971, 1972, or 1973; (2) that the jury's finding of no justification was against the manifest weight of the evidence or was based on no evidence at all; (3) that compensatory damages had not been proven with sufficient precision; and (4)

(Footnote continued from preceding page.)

9. If your answer to Findings numbered 1, 6, and 7, and any of 2, 3, and 4 is yes, and your answer to numbers 5 and 8 is no, state the amount of any compensatory damages sustained by the plaintiff in each of the following years:

(a) 1970	$35,278.88
(b) 1971	$42,376.67
(c) 1972	$206,818.92
(d) 1973	$423,523.20
(e) 1974 (thru September 25)	$563,319.68
TOTAL:	$1,271,317.35

10. If your answer to Findings numbered 1, 6, and 7, and any of 2, 3, and 4 is yes and your answer to number 5 and 8 is no, answer the following question. Was the defendant Shakespeare Company guilty of wanton, willful misconduct in effecting such breach?

Yes X No ____

11. If your answer to number 10 above is yes, please insert the amount of punitive damages below.

$1,675,555.00

SO SAY WE ALL.

that the evidence did not support an award of punitive damages. The court rejected Shakespeare's argument that the action was subject to the three-year New York statute of limitations, rather than the four-year Florida statute of limitations, and hence was barred. In addition to the grant of judgment notwithstanding the verdict, the court recited that, "Shakespeare's motion for a new trial is granted in accordance with the result reached in [the portion of the order dealing with proof of compensatory damages]—but this recital is, of course, for purpose of the record only."

Fury appeals, arguing that the district court's grant of judgment notwithstanding the verdict constitutes an unwarranted invasion of the jury's province as fact finders. Shakespear opposes this contention and, in addition, cross-appeals. On its cross-appeal it argues that the district court erred in holding Fury's action was not barred by the statute of limitations; that it erred in ordering that each party bear its own costs; and that, if we reverse the district court's judgment notwithstanding the verdict, a new trial should be held on all issues.

For the reasons that follow, we have decided that the district court erred in granting judgment notwithstanding the verdict on the issues whether the Fury-Omori contract was in existence in the years 1971, 1972, and 1973, whether the justification defense was available, and whether punitive damages were available. We also have decided that a new trial is required on the issue of compensatory damages. Because that issue is so intimately intertwined with the issue of liability, however, justice requires that a new trial be held on all issues. Finally, because the record is not sufficient for us to decide the statute of limitations issue, we remand that issue to the district court for further consideration.

II. ISSUES CONCERNING LIABILITY.

As we have said, the district court granted judgment notwithstanding the verdict on the issues whether the Fury-Omori contract was in existence in the years 1971, 1972, and

1973, and whether the justification or privilege defense was available. In reviewing these holdings, we must

> consider all the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion.

Boeing Co. v. *Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc). We hold there was sufficient evidence to present a jury question on each of these issues.

[1] A. *Proof of Continued Existence of the Fury-Omori Contract.* Under New York law, the elements of a cause of action for inducement to breach a contract are (1) the existence of a valid contract; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract; and (4) damages. *Israel* v. *Wood Dolson Co.,* 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956).[5] In this case, the court instructed the jury that the Fury-Omori contract was in existence for the period from December 15, 1969 to December 15, 1970. App. 1004. It gave to the jury the question whether the contract was in existence in 1971, 1972, and 1973. This question turned on whether Fury had renewed the contract for those years.

The contract's renewal clause, quoted in its entirely in Part I above, provides that the contract "shall continue in effect [for years after 1970], provided that Fury . . . shall place orders for at least 150,000 additional units of the product during [1970] or any renewal year, as the case may be . . ." The district court

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5. Under New York law, "Malice, in the sense of intending actual harm because of spite or ill feelings is . . . not a requisite to the tort of inducing breach of contract. . . . Knowledge of the existence of the contract is enough and implies malice." *American Cyanamid Co.* v. *Elizabeth Arden Sales Corp.,* 331 F. Supp. 597, 608 (S. D. N. Y. 1971), *accord. e . g., A. S. Rampell, Inc.* v. *Hyster Co.,* 3 N. Y. 2d 369, 376, 165 N.Y.S.2d 475, 144 N.E.2d 371 (1957); *Aljassim* v. *SS South Star,* 323 F. Supp. 918, 924 n. 12 (S. D. N. Y. 1971)

instructed the jury, "that in order to find that a contract existed during each of the succeeding years subsequent to December 15, 1970, you must find that orders were . . . placed with the Ohmori Corporation and *accepted by such corporation* in an amount not less than 150,000 units for each of the years in question." App. 1005 (emphasis added). It also instructed that, "the word 'accepted' as used in this instruction means an agreement by Ohmori on the purchase price, terms of payment, terms of shipment and other terms of sale in the purchase order."[6]

The evidence at trial showed that Fury customarily placed its orders with Omori through Shinei. Ciaccia, president of Fury, testified that some, but not all, of the orders were written. He said that he did place orders with Shinei for 150,000 reels in 1970, 1971, 1972, and 1973, *e. g.*, App. 683-86, and he produced what he said were all the orders that had been in writing. Mr. Kobayashi, president of Shinei, also testified that Fury ordered 150,000 reels from Omori through Shinei each year, that not all Fury's orders to Shinei were written, and that Shinei did not always pass these orders to Omori in written form. App. 906-07. In its special verdict, the jury specifically found that the contract had been extended in 1971, 1972, and 1973 by virtue of the fact that Fury had ordered at least 150,000 reels in each of those years. See note 4 *supra*.[7]

[2] The district court overturned the jury's conclusion that the contract was in existence in the years 1971, 1972, and 1973

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6. It will be noted that the renewal clause of the contract contains no explicit requirement that Omori "accept" Fury's orders in the manner defined by the district court before the contract would be considered renewed. Fury has not argued to this court that the district court's construction of the contract was wrong in this respect, however. *See* Baet for Appellant at 20.

7. It will be noted that the special verdict form, unlike the district court's instructions, does not refer to a requirement that Omori "accept" Fury's orders for the contract to be considered renewed.

on the grounds that there was no documentary evidence that Fury had ordered 150,000 reels from Omori in those years, and that there was no documentary evidence that Omori had accepted such orders, as the court had defined "accepted" in its instructions. The court stated that "the absence of such records is persuasive," citing Fed. R.Ev. 803(7).[8]

We find defects in both grounds of the district court's holding. First, the question whether Fury did order 150,000 reels in each year remained one of fact for the jury, not the court, to decide. As we have said, both Ciaccia and Kobayashi testified that the required number of reels was ordered each year and that the orders were not always in written form. Fury could not be required to produce writings that never existed. *Cf.* Fed.R.Ev. 1005. While the absence of written orders might be a factor for the jury to take into account in deciding whether Ciaccia and Kobayashi were telling the truth, it does not prove conclusively that they were not. Insofar as the district court based judgment notwithstanding the verdict on a lack of evidence that Fury ordered 150,000 reels each year, it erred.

The second branch of the district court's holding relied on a lack of proof that Omori had accepted the orders in question by agreeing on the terms of the orders. Because there was no proof that Omori had agreed on the terms of the orders, the court held, there was no proof that the underlying contract had been renewed. There seem to us to be two problems with this holding.

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8. Rule 803(7) describes evidence admissible as an exception to the hearsay rule:

> Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) [making 'records of regularly conducted activity' admissible despite the hearsay rule], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

First, Omori did, in fact, manufacture some reels for Fury in 1971, 1972, and 1973. Hence, it is plain that Omori and Fury *did* agree on the terms of an order for some number of reels. As we have seen, there was evidence from which the jury could have found that Fury ordered 150,000 reels each year. We think the jury could infer, from the facts that Fury ordered 150,000 reels and that Omori shipped some portion of that number, that Omori and Fury had agreed on terms to cover the entire order. The fact that Omori did not actually ship the number ordered does not necessarily mean that it did not agree to the terms of such an order.

Second, there was evidence in the record that the parties to the contract did not consider "acceptance" by Omori of Fury's enitre order, as the court defined "acceptance," to be a prerequisite to renewal of the contract. The court instructed the jury that it could take the parties' own practices under the contract into account in determining the contract's meaning and in determining whether the contract had been modified by implication.[9] Thus, the jury might have concluded from the parties' conduct that the contract had been renewed for the years 1971, 1972, and 1973 by virtue of the fact that Fury had

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9. . . . I instruct you that words in a contract are to be construed according to their ordinary meaning where nothing appears to show that they were used in a different sense. However, words and phrases used in particular contracts are to be interpreted in accordance with the meaning ascribed to them by the parties.

Also most importantly, the practical conduct or practices of the parties under a contract is a consideration of much importance in ascertaining the meaning of terms of a contract and that consideration is entitled to great, if not controlling, influence in ascertaining the parties' understanding of the terms and language. This is so because the parties are in the best position to know what was intended by the language employed.

Also, even if the terms of a contract are clear and unambiguous, those terms may be subject to modification by implication from the acts of the parties.

App. 1007.

placed the required 150,000 order, even if it was not shown that Omori had "accepted" all the orders Fury placed.

The evidence from which the jury might so have concluded consists of Omori's own statements at the time it "cancelled" the contract. On June 8, 1973 Mr. Omori wrote Shinei as follows:

> Gentlemen:
>
> Concerning a contract signed between the notifying party and your company as well as American Fury on December 15, 1969 for the Diamond Spinmaster Fishing Reels, we had notified Mr. Akira Kobayashi, the president of your company and Mr. William Ciaccia, the president of the Fury Company on or about December 10, 1972 that we wished to cancel the above contract. We hereby confirm this notification of the cancellation of the contract in writing and as of this date. Under the above contract, it had been agreed that there would be a purchase of 150,000 units each year, but because we were not able to fulfill such an agreement, it has become necessary to cancel the contract.

App. 1165. Omori wrote Fury a similar letter the same day, although that letter attempted to cast blame on Fury for the termination of the contract. App. 1136. These letters carry an implication that Omori himself considered the contract to have been in effect up until he terminated it; for if the contract had not been in effect, there would have been no need to cancel it. In addition, it is undisputed that Omori did, in fact, produce reels for Fury in 1971, 1972, and 1973, although not in the quantity that Fury ordered. And finally, at no time during Mr. Omori's testimony at trial did he intimate that he did not consider the contract not to have been renewed for those years. From all this, we think the jury could have inferred that, in the minds of the parties to the contract, the contract had been renewed each year. We therefore hold that the district court erred in granting judgment notwithstanding the verdict for

Shakespeare on the ground that, because it was not shown Omori "accepted" the full order placed by Fury in the years in question, the contract was not still in effect.

[3] B. *Justification or Privilege.* We also think the district court erred in granting judgment notwithstanding the verdict on the issue of justification or privilege. In its fullest discussion of the subject to date, the New York Court of Appeals has recognized the general rule that, "Procuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justifiable for what would otherwise be an actionable wrong." *Felsen* v. *Sol Cafe Manufacturing Corp.*, 24 N.Y.2d 682, 687, 301 N.Y.S.2d 610, 613, 249 N.E.2d 459, 461 (1969), *quoting Knapp. v. Penfield,* 143 Misc. 132, 134-35, 256 N.Y.S. 41 (Sup.Ct.1932). The cases finding privilege or justification, cited with approval in *Felsen,* include ones where the defendant and the plaintiff each had a contract with a third party, and the defendant induced the third party to breach its contract with the plaintiff, *e. g., Knapp* v. *Penfield, supra;* and cases where the defendant was a stockholder in a corporation, and the defendant induced the corporation to breach a contract with the plaintiff, *e. g., Morrison v. Frank,* 81 N.Y.S.2d 743 (Sup.Ct.1948). *Felsen* itself was the latter sort of case.

In both kinds of cases, an inducement to breach is privileged only if the defendant's purpose is to protect his own contractual or equity interest, upon which the privilege is based. *See, e.g., Felsen, supra,* 24 N. Y. 2d at 687, 301 N. Y. S. 2d 610, 249 N. E. 2d 459; *Knapp* v. *Penfield, supra,* 143 Misc. at 135, 256 N. Y. S. 41; *The Savage Is Loose Co.* v. *United Artists Theatre Circuit, Inc.,* 413 F. Supp. 555, 560 (S. D. N. Y. 1976); Restatement of Torts § 679(b) & Comment b (1939).[10]

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10. § 769 of the Restatement states:

> One who has a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor

(Footnote continued on following page.)

In this case, Shakespeare argues that it had two kinds of "existing economic interests" in Omori that justified its inducement to breach the Fury-Omori contract. First, it relies on its "permanent order" of reels from Omori, which predated Fury's contract with Omori, as creating a "contractor's privilege." Second, it relies on its purchase of one-sixth of Omori's stock and $200,000 interest free loan to Omori as creating an "owner's privilege" or "investor's privilege." In order to protect these "existing economic interests," Shakespeare tells us, it was privileged to induce Omori to breach its contract with Fury. The district court, recognizing the principle "that one who has a financial interest in the business of another is privileged to interfere with a contract between that business and a third person provided that the purpose is to protect its own interest," App. 55, accepted the argument.

The difficulty with the argument, to our minds, is that the jury had evidence before it from which it properly could have found that Shakespeare's purpose in inducing the breach was *not* to protect either its "permanent order" with, or its "ownership interest" in, Omori. It may be, as Shakespeare has argued throughout, that its purpose in buying equity in Omori and loaning it money was to prop up a failing supplier. But it is considerably less clear that requiring Omori to terminate a contract that accounted for thirty percent of Omori's total production would go far toward strengthening Omori's financial position. The jury could have found from the record a

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(Footnote continued from preceding page.)

(a) does not employ improper means and

(b) acts to protect his interest from being prejudiced by the relation.

By its terms, the privilege stated in § 769 applies only to interference with noncontractual business relations, and not to inducements to breach an existing contract. See § 769, Comment d. It appears, however, that the New York courts also have applied this privilege to inducements to breach existing contracts. *See Morrison* v. *Frank, supra,* 81 N.Y.S.2d at 744.

belief on Shakespeare's part that Omori would fail, despite Shakespeare's purchase of stock and loan, without the Fury contract—unless Shakespeare mustered enough additional orders to take up the slack that would be left by the ouster of Fury. The jury also could have found that Shakespeare experienced considerable difficulty producing enough additional orders to keep Omori afloat, and that this was the reason Omori did not terminate its contract with Fury altogether until 1973. From all this, the jury could have concluded that Shakespeare's efforts to induce Omori to cut off supplies to Fury were in conflict with, and not in furtherance of, Shakespeare's professed purpose of keeping Omori in business so it could continue to make reels for Shakespeare under Shakespeare's "permanent order."

At the same time, it is far from clear that Shakespeare's purpose in inducing the breach was to protect its ownership interest in Omori. The jury could have found, from the testimony of one of Shakespeare's own employees, that Shakespeare did not care whether Omori made any substantial profits. App. 168-69. The jury also could have found that Shakespeare wanted Omori to cut off Fury as soon as Shakespeare could place enough orders to keep Omori afloat, even if Omori could make more profit by also keeping the Fury business. From this, the jury could have concluded that Shakespeare's purpose in inducing the breach was not to protect or enhance its equity interest in Omori, but rather was in conflict with such a purpose.

The evidence from which the jury could have found that Shakespeare's purpose in inducing the breach was not to protect either its source of supply or its equity interest in Omori is buttressed greatly by a series of memoranda circulated among Shakespeare executives. These memoranda would support a finding that Shakespeare's purpose in inducing the breach was, in fact, to eliminate Fury as a competitor in the market to sell reels. For instance, on July 9, 1971, Bert Rost,

managing director of Shakespeare's German subsidiary, wrote Ben Hardesty, vice-president for marketing of Shakespeare:

> The [Omori] factory is geared to make approx. 350,000 reels a year which is the minimum quantity for a moderately profitable operation. 500,000 could be made without any problems. As long as we cannot absorb the minimum quantity the factory has to produce to exist *we have to look for business from our competitors even if we do not like it. I am really trying hard to eliminate any other customer from the Omori factory but I am afraid it might take another year* . . .
>
> * * * * *
>
> If you come to the conclusion that Mr. Omori should not make reels any more for somebody else please get in touch with Mr. Watanuki [the Shakespeare representative on Omori's board of directors] by phone or telex. *I have the feeling that there is still time to stop the order from Fury.* By doing this we commit ourselves for feeding the Omori company with sufficient orders and permitting them to ship the production right away or give financial help.

App. 1028 (emphasis added). On February 28, 1972 Rost wrote Hardesty:

> Let's hope our sales will continue to be good and will finally reach a volume which enables us to absorb Omori's full capacity *to eliminate supplies to the one other outlet left to Omori* [i. e., Fury] . . . *I think both, Clyde* [Rickard of Shakespeare's marketing division] *and Dick* [?] *would feel much better if we could cut off FURY from Omori.*

App. 1046-47 (emphasis added). On April 13, 1972 Rost wrote Hardesty;

> . . . Mr. Omori was approached by Shinei (Fury's Japanese broker) to accept a fresh order for more than 100,000 reels . . . Mr. Omori rejected but, if I understood correctly, left it open to accept the order if the reels can be produced and shipped from July and September as last year. During this period last year he had no orders from us and was more than happy to receive the Fury order at all. *If we want to*

> *get Fury out already this year, immediate action must be taken.* I consider the risk very small even though I am afraid 180,000 reels for Europe is a lot but feel almost certain Clyde might be able to sell additionally in the States what we will miss out. *Isn't there a good chance for Clyde to get the larger part of the Fury business if we cut them off smartly?*

App. 1054 (emphasis added). On April 17, 1972 Rickard wrote Hardesty:

> . . . I am in a position to commit the Shakespeare Marketing Division for 185,000 Omori manufactured reels . . . . *I cannot commit for this quantity if we continue to allow Omori to manufacture reels for Fury. Fury has, as you know, a look alike reel to our import and they have caused us a tremendous amount of problems in the market place due to their pricing.*

App. 1049 (emphasis added). And at about the same time, Rickard telexed to Rost:

> [*I*] *can no longer live with* [*O*]*mori manufacturing reels for* [*F*]*ury* . . . . [*S*]*o lets make the move and get* [*F*]*ury out.* [*I*]*t will save us a lot of heartaches in the states.*

App. 1056 (emphasis added). Finally, there was evidence that after Omori quit making Spinmaster reels for Fury, it made the identical reel for Shakespeare, App. 504, as the June 10, 1970 agreement between Shakespeare and Omori appears to have contemplated, *see* text and note at note 2 *supra*. We think this evidence, together with that reviewed above, would support a jury finding that Shakespeare's sole purpose in inducing Omori to cut off Fury was to eliminate a competitor in the market to sell reels, and not to preserve Omori as a source of supply or as an investment. If that were the case, Shakespeare would have no valid claim of privilege.

To be sure, Shakespeare argued below, as it has argued here, that it *was* necessary to cut off Fury in order to save Omori, because of what it says were lapses on Fury's part in

dealing with Omori. But whether that was true also was for the jury to decide. We therefore hold that the district court erred in granting Shakespeare judgment notwithstanding the verdict on the issue of privilege.

III. COMPENSATORY DAMAGES.

To prove actual damages caused by the breach induced by Shakespeare, Fury introduced the testimony of its accountant. Fury sold five different models of reels produced by Omori. The accountant testified that he had taken a random sample of Fury's purchase and sales invoices for each year in which damages were claimed. From this sample, he determined the average cost to Fury for each model of reel each year, and the average price that Fury sold each model for each year. By subtracting the former from the latter, he determined the difference each year between the average cost to Fury and the average price that Fury sold each model for. He then determined the average of the five models' averages to arrive at the overall average difference, for all five models, between cost and sales price each year. This figure was meant to represent the average gross profit per reel to Fury each year, for the five models combined.[11] The accountant testified that this method

11. The accountant used 1971 figures to give an example of his method. In that year, he said, the average cost to Fury for Model No. 1 was $3.34, No. 2, $3.60; No. 3, $4.10; No. 4, $4.52; and No. 5, $5.05. App. 803-04. In the same year he said, Fury's average selling price for Model No. 1 was $5.08; No. 2, $5.52; No. 3, $5.99; No. 4, $6.06; and No. 5, $7.40. App. 804. The difference between the average cost and average selling price for each model, then, was follows:

	No. 1	No. 2	No. 3	No. 4	No. 5
Selling price	$5.08	$5.52	$5.99	$6.06	$7.40
Cost	3.34	3.60	4.10	4.52	5.05
Difference	$1.74	$1.92	$1.80	$1.54	$2.35

The accountant then took a simple average of these five figures, which he said came to $1.97. By our calculation, it comes to about $1.89. The defendant, however, has not complained of the apparent discrepancy.

for determining the average gross profit represented standard accounting procedure. App. 795-96.

The accountant was permitted to testify from his summaries, which had been made available to the defendant along with the records underlying them, as to what this average was for each of the five years in question.[12] He also was permitted to testify as to the difference between the number of reels actually received and sold by Fury each year, and the 150,000 that Fury supposedly had ordered from Omori each year.[13] The accountant agreed that increased expenses that would accompany increased sales should be deducted from gross profits to arrive at net profits, but he assigned no figures for how much expenses would have increased.

In final argument to the jury, Fury's counsel requested, as actual damages, an amount equal to the number of reels that Omori should have supplied, but did not, times the average gross profit per reel, for each of the five years in question.[14] The assumption, for which there was support in the evidence, was that Fury could have sold 150,000 reels each year if Omori had

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12. The figures for each year were as follows, App. 801-07:

1970	1971	1972	1973	1974
$2.6	$1.97	$3.14	$2.91	$4.92

13. The figures for each year were, App. 802-08:

1970	1971	1972	1973	1974
35,874	77,136	131,244	113,844	150,000

14. Relying on the figures set out in notes 12 and 13 *supra*, he requested:

1970	1971	1972
35,874	77,136	131,244
× $.26	× $1.97	× $3.14
$9,327.24	$151,957.92	$412,106.16

1973	1974
113,844	150,000
× $2.91	× $.92
$331,286.04	$738,000.00

shipped that many. Fury's counsel told the jury that it should reduce these figures by whatever amount of expense it thought should be attributed to the lost sales, based on expense figures appearing in Fury's profit-and-loss statements that were in evidence. He contended, though, that this amount would not be great. App. 989.

The special verdict form given to the jury called for it to enter a separate figure for actual damages for each year in question. The figures requested by Fury, and those awarded by the jury, compare as follows:

	Requested	Awarded
1970	$ 9,327.24	$ 35,278.88
1971	$ 151,957.92	$ 42,376.67
1972	$ 412,106.16	$ 206,818.92
1973	$ 331,286.04	$ 432,523.20
1974	$ 738,000.00	$ 563,319.68
Total	$1,642,677.36	$1,271,317.35

It will be noted that for the year 1970, the jury awarded about $26,000 more than Fury had requested; and for 1973, it awarded about $101,000 more than Fury had requested. Its total award, however, was less than the total requested by Fury.

As we read the district court's opinion, it found three weaknesses in the proof and verdict on actual damages. First, it objected to the method the accountant used to arrive at the average gross profit per reel for each year, because that method did not take into account the number of reels of each model that were sold. That is, because the gross profit per reel varied from model to model, the court thought the average gross profit per reel for the five models combined should have been weighted to take into account how many reels of each model were sold. Second, the court thought the accountant's testimony as to lost profits was deficient because it did not take into account increased operating expenses that would accompany increased sales, and that should be subtracted from lost gross

profits to arrive at lost net profits. And finally, the court thought the discrepancy for the years 1970 and 1973 between the amount Fury had requested and the amount the jury had awarded demonstrated that the jury had gone outside the evidence or had simply become confused. We agree, in general, with the second and third points made by the district court, and hold that a new trial is required.

[4] A. *The Accountant's Method of Estimating Gross Lost Profits.* We agree with Shakespeare that Fury was required to prove the amount of its damages with a reasonable degree of specificity. We disagree, however, that the accountant's method of calculating lost gross profits was so lacking in probative value as to preclude an award based on his estimate.

As Judge Ainsworth recently had occasion to explain, "[T]he issue is whether the probative value of the expert's testimony was so slight that it should not have been submitted to the jury. [cite] A jury's award of damages . . . may have adequate support in the evidence even though an expert's assumptions and methodology may not have been the only permissible ones for determining damages." *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 999 (5th Cir. 1976). In this case, the district court admitted the accountant's testimony over defendant's objection based on the method of calculation, stating, "We have an expert on the stand and I think he is subject to your cross examination. I am going to let him testify about the averages. And of course, you have an expert here listening, by the way." App. 796. We think the district court's first impulse was correct. While it appears that the estimate of lost gross profits might have varied if the accountant had performed the operation contended for by the defendant, the accountant testified that his method was an accepted one. The defendant has not attempted to show that this is not true, either below or in this court. Moreover, it was open to the defendant, to whom the records upon which the accountant based his testimony had been made available, to

contradict the estimate with expert testimony and calculations of its own. In these circumstances, we cannot say that the probative value of the accountant's testimony was so slight that is should not have been submitted to the jury.

[5] B. *Proof of Net Lost Profits.* The district court's second point is well taken. Fury concedes that it was entitled only to net, not gross, lost profits. Yet it made only the most perfunctory gesture toward presenting the jury with a basis for estimating how much its expenses would have increased if Omori had delivered 150,000 reels per year.[15] Ciaccia testified that expenses connected with Fury's sale of reels would have included the cost of traveling expenses, printing catalogs and price lists, booking orders, opening letters of credit, warehouse insurance, and sales commissions; but at no point did he make even a rough estimate as to the magnitude of these expenses. App. 757—63. The accountant testified in similarly general fashion. App. 843—48. The only evidence from which the jury might have begun to guess how much Fury's expenses would have increased were Fury's profit-and-loss statements for 1970, 1971, and 1973, which show the expenses actually incurred by Fury for those years. App. 1228, 1131, 1135. But the jury was given no basis on which it could have extrapolated from these historical figures to decide how much Fury's expenses would have *increased,* if more reels had been delivered. In short, there was simply no evidence at all as to net, as distinguished from gross, profits. *See Cook Industries, Inc.* v. *Carlson,* 334 F.Supp. 809, 816-17 (N.D.Miss. 1971).

In these circumstances, we ordinarily would reverse and remand for a new trial limited to the issue of damages. *See,*

15. Although they argued the point below, neither party has taken a clear position in this court on whether a portion of the expenses that would *not* have varied with increased sales also should be subtracted from gross lost profits to arrive at net lost profits. *See generally* Annot., 3 A.L.R.3d 689 (1965). We therefore express no opinion on this question.

e.g., Nat Harrison Associates, Inc. v. *Gulf States Utilities Co.*, 491 F.2d 578, 588 (5th Cir. 1974). In this case, however, "the question of damages is so interwoven with that of liability that the former cannot be submitted to the jury without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931); *see, e. g., Howell* v. *Marmpegaso Compania Naviera, S. A.*, 536 F.2d 1032, 1035 (5th Cir. 1976); *Korbut* v. *Keystone Shipping Co.*, 380 F.2d 352, 354 (5th Cir. 1967). This is so because, among other reasons, the question of causation is so intimately tied to the question of damages.[16] Moreover, as the district court correctly pointed out the jury's verdict on damages at the first trial suggests some rather fundamental confusion, the source of which is impossible to trace.[17] In these circumstances, we hold that the interests of justice require a new trial on issue of liability as well as damages.

IV. PUNITIVE DAMAGES.

The district court instructed the jury that if it found Fury was entitled to compensatory damages, and if it further found

> that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously

16. Shakespeare can be held liable only for those breaches by Omori that it induced. This is a substantial point on the facts of this case. For instance, there was evidence that Omori was in financial trouble in 1969-70, which might have affected its capacity to produce reels. In addition, it is possible that Omori breached the contract in part even before it entered the agreement with Shakespeare under which it agreed to stop dealing with Fury.

17. At the retrial, if the district court again uses a special verdict, it might consider Fury's complaint that it is asking too much of a jury to keep track of five years' worth of damage calculations without the benefit of pencil and paper.

choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or failure to act is 'wantonly' done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

App. 1015. The court instructed the jury to bear in mind that the purpose of punitive damages is "to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct." App. 1014, 1016. The jury found in its special verdict that Shakespeare was guilty of "wanton, willful misconduct" in inducing the breach, and it awarded substantial punitive damages.

[6] The district court, stating that under New York law punitive damages may be recovered "where the wrong complained of is morally culpable, or ... actuated by evil and reprehensible motives or a desire to harm the plaintiff, or where an act is so reckless that its carelessness indicates a heedless disregard of the rights of others," App. 60, nonetheless overturned the jury's verdict. On the evidence in this case, we think this was error.

The New York Court of Appeals has recognized that it "may be difficult to formulate an all-inclusive rule or principle as to what is an appropriate case for the recovery of punitive damages." *Walker* v. *Sheldon,* 10 N.Y.2d 401, 406, 223 N.Y.S.2d 488, 492, 179 N.E.2d 497, 499 (1961). As the district court correctly noted, the New York courts have allowed punitive damages "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives," *Walker* v. *Sheldon, supra,* 10 N.Y.2d at 404, 223 N.Y.S.2d at 490, 179 N.E.2d at 498, and where a tort "was committed recklessly or wantonly, i.e., without regard to the rights of the plaintiff, or of people in general," *Soucy* v. *Greyhound Corp.,* 27 A.D.2d 112, 113, 276 N.Y.S.2d 173, 175 (1967), *quoting Magagnos* v. *Brooklyn Heights R. R. Co.,* 128 App.Div. 182,

183, 112 N.Y.S. 637 (1908); *accord, e. g., Hamilton* v. *Third Ave. R. R. Co.*, 53 N.Y. 25, 30 (1873); *Hayes* v. *State of New York,* 80 Misc.2d 498, 506, 363 N.Y.S.2d 986 (Ct. Claims), *rev'd on other grounds,* 50 A.D.2d 693, 376 N.Y.S.2d 647 (1975); *Da Cesta* v. *Technico Construction Corp.,* 74 Misc.2d 583, 584, 344 N.Y.S.2d 967 (Civ.Ct.N.Y.C.1973), *aff'd,* 78 Misc.2d 1100, 360 N.Y.S.2d 846 (Sup.Ct.1974). Moreover, "The list of actions in which punitive damages have been permitted in [New York] is long . . . for . . ., 'It is not the form of action that gives the right to the jury to give punitory damages, but the moral culpability of the defendant.' " *Walker* v. *Sheldon, supra,* 10 N.Y.2d at 404 05, 223 N.Y.S.2d at 490, 179 N.E.2d at 498; *quoting Hamilton* v. *Third Ave. R. R. Co., supra,* 53 N.Y. at 30.

In this case there was evidence from which the jury could have found that the defendant set out deliberately to destroy plaintiff's business, and to take that business for its own. The jury also could have found that to accomplish this end, defendant's executives, over a period of years, consistently acted with complete disregard for known contractual rights of the plaintiff. Although we cannot be certain what the New York courts would do in a case like this, we do know that federal courts applying very similar law from other states have found the evidence sufficient to support awards of punitive damages in very similar inducement-to-breach cases. *Hannigan* v. *Sears, Roebuck and Co.,* 410 F.2d 285, 293-94 (7th Cir.), *cert. denied,* 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969); *ABC Paramount Records, Inc.* v. *Topps Record Distributing Co.,* 374 F.2d 455, 462-63 (5th Cir. 1967). We think the same result should obtain under New York law here.[18]

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18. We do not think, as the district court may have thought, *see* App. 60, that the fact that defendant may have acted with the motive of gaining greater profits would change the result. *See Walker* v. *Sheldon, supra,* 10 N.Y.2d at 406, 223 N.Y.S.2d 488, 179 N.E.2d 497.

Although we hold that the district court erred in setting aside the jury verdict as to punitive damages, we also hold that this issue must, in the interest of justice, be retried with the other issues. Plaintiff is entitled to no punitive damages unless the jury finds for it on liability and awards some actual damages. Moreover, an award of punitive damages should rest on the jury's assessment of all the evidence in the case. Hence, the issue of punitive damages is so intertwined with the other issues that it should be retried with them. *See* Part III.B. *supra.*

[7] We also hold that evidence of defendant's wealth is admissible on the issue of the amount of punitive damages. *Rupert* v. *Sellers,* 48 A.D.2d 265, 269, 272, 368 N.Y.S.2d 904 (App.Div.1975). It appears that no issue was raised below as to whether a federal court applying New York law should follow the procedure recommended in *Rupert* of not submitting such evidence to the jury until after the jury finds that the defendant is liable for punitive damages. We therefore express no opinion on this question.

V. STATUTE OF LIMITATIONS.

Shakespeare argues that the district court erred in holding Fury's cause of action was not barred by the appropriate statute of limitations. This argument consists of three basic components: first, that the district court erred in holding that Florida's four year statute, rather than New York's three year statute, applied; second, that the cause of action accrued more than three years before Fury filed suit; and third, that the statute was not tolled for any reason.

Because the case must be remanded for a new trial anyway, and because the statute of limitations question may raise issues that were not considered at the first trial, we do not think we should pass on these questions at this time. Specifically, it does not appear from the record whether the district court took into account Florida's "borrowing" statute, F.S.A. § 95.10, in deciding to apply the four year statute of limitations

of F.S.A. § 95.11. Shakespeare argues here that the cause of action "arose" in New York, and that Florida therefore would "borrow" the three year New York Statute of limitation, N.Y.Civ.Prac. § 214(4) (McKinney).[19] We cannot say on the record before us where the cause of action "arose," and think this point should be considered in the first instance, if it has not been already, by the court below.

If the district court were to decide that the New York statute of limitations should have been applied, it will, of course, have to decide when Fury's cause of action accrued under New York law, and whether any reason exists for tolling the statute. Although the parties address much argument to us on these issues, we think it would be premature to pass on them at this point. This is especially so because there may well be issues of fact upon which a jury should pass as to just when the first breach occurred, and whether fraudulent concealment occurred. *See* Brief for Appellants at 26-28. We therefore do not rule on these issues. We find it unnecessary to rule on any of the other issues raised by the parties.

REVERSED.

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19. Shakespeare also argues that the district court erred in holding that the parties' informal stipulation that New York law would apply was not intended to extend to the statute of limitations question. The district court, of course, was not bound to follow a stipulation as to a question of law. *Equitable Life Assurance Soc'y.* v. *MacGill,* 551 F.2d 978, 983 (5th Cir. 1977). Moreover, as the district court stated, "The vagueness of the stipulation combined with the failure of the defendant to cearly advance its conflicts-of-law position have posed some needless problems throughout the trial and post-trial stages." App. 56, n. 3. In these circumstances, we will not disturb the district court's interpretation of the stipulation.

Filed April 21, 1975

UNITED STATES DISTRICT COURT

Southern District of Florida

No. 74-49-Civ-CA

FURY IMPORTS, INC.

Plaintiff

v.

SHAKESPEARE COMPANY and
SOUTHERN TACKLE DISTRIBUTORS

Defendants

In this action for tortious inducement of a breach of contract, the jury returned a verdict against the Shakespeare Company (Shakespeare) for $1,271,317.35 in compensatory damages and $1,675,555.00 in punitive damages. Shakespeare urges five grounds in support of its post-trial motions.[1]

1. THE DEFENSE OF JUSTIFICATION

The defendant's German subsidiary had been a substantial customer of Omori corporation (Omori) since 1963. The latter was the manufacturer of fishing reels which were the subject of the breached contract signed by the plaintiff (Fury), Omori and Shinei Corporation, dated December 15, 1969. At the request of Omori, then in serious financial difficulty, Shakespeare invested through its Japanese subsidiary approximately $25,000.00 in the purchase of 16% of the capital stock of Omori. As required by the memorandum between Shakespeare and Omori, dated June 10, 1970, Shakespeare also made a

1. The asserted bases for post-trial relief include (a) legal justification, (b) statute of limitations, (c) no factual or legal basis for punitive damages, (d) insufficient evidence to support the compensatory damages awarded, and (e) lack of jurisdiction over the subject matter because of arbitration provisions in the contract breached.

$200,000.00 interest free loan to Omori.[2] Shortly thereafter Shakespeare advanced another $50,000.00 to Omori at its request to meet debts to suppliers because Fury failed to pay for reels manufactured for it by Omori.

That Omori was in need of financial help is confirmed by Fury's President, Ciaccia. He wrote a letter to the President of Southern Tackle Distributors on July 13, 1970 in which he referred to the "Shakespeare/Omori deal," stating that it "will actually help us" since "it makes Omori financially strong which will insure continued deliveries." (Shakespeare's exhibit 7). In another letter, dated July 7, 1970, Ciaccia stated to Southern Tackle, Fury's only customer, "the situation with Omori is truly serious. . . . Omori could go into bankruptcy, or at the very least, be so financially weakened, that he would cease to be an effective producer." (Shakespeare's Exhibit 6).

It is thus apparent that Shakespeare had a present, existing economic interest in Omori which Shakespeare had a right to protect. This economic interest afforded Shakespeare a privilege to induce termination of the December 1969 contract.

The New York courts have held that one who has a financial interest in the business of another is privileged to interfere with a contract between that business and a third person provided that the purpose is to protect its own interest and it does not employ improper means to effectuate its goal. *Felsen* v. *Sol Cafe Mfg. Corp.*, 301 N.Y.S.2d 610, 249 N.E.2d 459 (1964); *Morrison* v. *Frank*, 81 N.Y.S.2d 743 (Sup. Ct. 1948).

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2. The memorandum also provided (a) that there would be close cooperation between Omori and NST, Shakespeare's Japanese distributor, (b) that the President of NST would become a member of Omori's board of directors, and (c) that within a year or so, Omori would stop deliveries of "Diamond Spinmaster" reels through Fury and would develop similar reels for NST and Shakespeare to market worldwide.

The jury was adequately instructed on the issue of justification. (Tr. 1226, 1236-37). Their verdict on this issue, however, was against the manifest weight of the evidence. Clearly, the defendant had a viable existing economic interest in the affairs of Omori. Also, the Court has combed the record and is unable to find any evidence that the defendant was motivated by actual malice toward the plaintiff or employed any illegal means to protect its economic interests.

Moreover, the Court concludes that there was no evidence presented upon which the jury could properly base a verdict for the plaintiff on the issue of justification. Accordingly, judgment must be entered on defendant's motion for directed verdict made at the close of all the evidence.

II. THE STATUTE OF LIMITATIONS

Under New York law, the controlling statute of limitations is three years. *Hanrihan* v. *Parker,* 19 Misc.2d 467, 192 N.Y.S.2d 2 (Sup. Ct. 1959). Florida's applicable limitations period is four years. While the parties stipulated that New York law would apply.[3] This agreement related only to

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[3] This stipulation is reflected in the transcript at p. 1053. See also Exhibit A to defendant's Motion to Strike filed September 11, 1974. The vagueness of the stipulation combined with the failure of the defendant to clearly advance and support its conflicts-of-law position have posed some needless problems throughout the trial and post-trial stages.

The defendant, through a motion to strike filed Setpember 11, 1975, just eight days prior to the commencement of trial, and through a letter-notice of the same date, first informed the Court and the plaintiff respectively of the possible application of Japanese Law. This notice was not reasonable within the intendment of Federal Rule of Civil Procedure 44.1.

It has been and still is the position of the defendant that application of Japanese law bars an award of punitive damages in this case. But the ramifications of this assertion would have had an impact on the trial of this cause beyond the issue of punitive damages. For underlying the contention that punitive damages cannot be

(Footnote continued on following page.)

substantive matters as distinguished from procedural matters. In Florida, statutes of limitations are regarded as procedural. *Calhoun* v. *Greyhound Lines, Inc.*, (Fla. App. 1972), 265 So.2d 18. Under the appropriate conflicts principles, then, the law of the forum is applicable to the limitations problem before the Court. Hence, this action is not barred as it was filed within four years of the act of inducement which occurred on June 10, 1970 in Tokyo at the New Otani Hotel.

III. PROOF OF THE EXISTENCE OF THE UNDERLYING CONTRACT

The jury was charged that the contract of December 15, 1969 established a contractual relationship among the three entities—Omori, Fury and Shinei. It was, therefore, in full force in 1970. The jury was further instructed that the contract would only remain in effect during the succeeding years of 1971, 1972 and 1973, if it found that orders for not less than 150,000 reels were placed and accepted in each of those years.

(Footnote continued from preceding page.)

awarded under Japanese law is the assumption that Japanese law on punitive damages applies. This point was argued by both sides to some degree. The problem arises, however, in that the defendant failed to proffer the appropriate Japanese law with respect to the other issues in the cause. This failure is fatal to the defendant's contention that the punitive damages claim is barred by Japanese law. For in order to apply Japanese law on the substantive issue of punitive damages, it would be necessary to hold that the appropriate choice-of-law for the whole cause of action was Japanese. This was neither argued nor supported by the defendant. The Court concludes that to recognize Japanese law on a single issue which is favorable to the proponent of that foreign law while not applying Japanese law to other substantive issues which may not be so favorable would be anamolous and unjust.

The plaintiff urged the applicability of New York law to the substantive matters of this cause of action. The defendant failed to carry its burden to demonstrate that Japanese law controlled the issues in the action. In view of this failure, it is appropriate to adopt and apply the stipulation of the parties with respect to the applicability of New York law to this cause. *See*, 9 *Wright and Miller*, Federal Practice and Procedure, § 2447 (1971).

The word "accepted" was defined to mean an agreement by Omori on the purchase price, terms of payment, terms of shipment, and other terms of sale in the purchase order. There were five different models of reels with varying prices available to Fury.

No documentary evidence was adduced at the trial establishing that Fury, through Shinei, ordered 150,000 reels from Omori in 1971, 1972 or 1973. Nor was any such evidence submitted showing that Omori accepted orders in the requisite amounts, agreeing on the purchase price, terms of payment, terms of shipment and other terms of sale in a purchase order. The contract, by specific terms, required mutual agreement by Omori and Fury on these precise terms. Both Omori and Akira Kobayashi, the representatives of Shinei Corporation, testified that some of the purchases were by written order.[4] The absence of such records is persuasive. See Rule 803(7) Federal Rules of Evidence, effective July 1, 1975.

The evidence adduced fell far short of establishing the existence of a contract between Fury and Omori in 1971, 1972 and 1973 as a prerequisite for the recovery of damages in this case. It is fundamental that the underlying contract must exist for Fury's claim to be viable. *See, Winer* v. *Glaser,* 3 A. D. 2d 656, 158 N. Y. S.2d 1016 (1957). Thus, Fury's failure of proof in the above respect precludes an award of compensatory damages.

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[4] TR. 953, 990
The evidence to support the required order of 150,000 reels appeared in such statements as "I believe in excess of 90,000 were ordered in 1971; I think Fury ordered 100,000 fishing reels for 1972 and 1973; I placed an order for 250,000 fishing reels for 1972 and 1973;" "The orders were sometimes by letter, sometimes by telex, sometimes oral." There was also a statement that some orders were placed by telephone or brought in person to the Omori factory. (Tr. 216, 236, 238, 953, 955).

IV. PROOF OF DAMAGES

Fury also failed to prove with sufficient certainty a loss of its profits in the amounts claimed as a proximate result of Shakespeare's wrong.

Damages cannot be merely speculative or conjectural. The evidence must furnish data for a reasonably accurate estimate of the amount of damages. *Nat Harrison Associates, Inc.* v. *Gulf States Utilities Co.,* 491 F. 2d 578, 587 (5 Cir. 1974).

Fury offered proof of its lost profits through its accountant Morgenstern. This witness' estimate of lost profits did not take into account expense of commissions paid to manufacturers' representative, the cost of letters of credit involved in the purchase of the fishing reels, the expense of "booking" each order, insurance, and other expense items shown on the financial statement of Fury as the cost of doing business. (Tr. 797, 798, 794-795, 799, 883, 884).

There was no showing of how many reels of each of the five models were purchased, the price of which varied as much as 61 cents for the year 1971. (Tr. 839-840). Morgenstern used simple averages in each of the subject years. These could not reflect the variation in price because it depended upon the type or model of reels ordered and the quantities of such. The jury did not have the benefit of this essential information.

In closing argument, Fury's counsel claimed damages for each of the years 1970, 1971, 1972, 1973 and 1974, in a specific amount. The "loss" claimed was arrived at by multiplying the number of fishing reels not shipped by Omori, based on the asserted order of 150,000 reels each year, by an average difference between Fury's average purchase price and its average sale price for *all* models of the reels.

Exemplary of the jury's speculation is shown by its having awarded $35,278.88 as damages for the year 1970 when Fury's counsel claimed only damages of $9,327.24. Likewise, $423,523.20 was awarded by the jury for the year 1973 when the maximum claimed by counsel was $330,704.04.

The Court concludes, then, that the amount returned by the jury as compensatory damages has no rational basis in the evidence presented or rational connection to the exact amount of the damages sought by Fury.

V. PUNITIVE DAMAGES

The New York decisions approve award of punitive or exemplary damages where the wrong complained of is morally culpable, or actuated by evil and reprehensible motives or a desire to harm the plaintiff, or actuated by evil and reprehensible motives or a desire to harm the plaintiff, or where an act is so reckless that its carelessness indicates a heedless disregard of the rights of others. *Dupont Galleries, Inc.* v. *International Magni-Tape, Ltd.*, 300 F.Supp. 1179, (S.D.N.Y. 1969); *Walker* v. *Sheldon*, 10 N.Y.2d 401, 179 N.E. 2d 497 (1961).

Recovery of punitive damages requires facts tending to show actual malice or so great an element of malice, fraud or gross negligence that the Court feels the defendant must be punished. *Anthony* v. *George T. Bye, Inc.*, 243 A.D. 390, 277 N.Y.S. 222 (1935). Recovery can only occur where there is actual malice directed against the plaintiff as distinguished from the situation where acts are done on behalf of the defendant for business reasons. *O'Connor* v. *GLA Corp.*, 332 F.Supp. 1246 (S.D.N.Y. 1971).

As the jury was instructed, proof of actual malice is necessary for an award of punitive damages. (Tr. 1233, 1238-1240). Proof of legal malice sufficient to establish liability or interference is insufficient by itself to create a basis for an award of punitive damages. (Tr. 1233).

The evidence here does not establish that the conduct of Shakespeare was such as to permit an award of punitive damages.

VI. LACK OF SUBJECT MATTER JURISDICTION

Shakespeare urges that this Court lacks jurisdiction because the contract among Fury, Shinei and Omori provided for

arbitration in Japan of any controversy or claim arising out of or relating to such agreement. It is clear that Shakespeare is not in a position to invoke such arbitration provisions because it was not a party to such agreement.

VII. CONCLUSION

In light of the conclusions reached in Sections I, III and V, Shakespeare's motion for judgment notwithstanding the verdict is granted. Shakespeare's motion for a new trial is granted in accordance with the result reached in Section IV—but this recital is, of course, for purposes of the record only.

The Clerk will forthwith enter a judgment for the defendant. Each party will bear its own costs.

ENTERED at Miami, Florida this 16th day of April, 1975.

/s/CLYDE ATKINS

United States District Judge

THE CIVIL CODE OF JAPAN

UNDER
AUTHORIZATION
OF
THE MINISTRY OF JUSTICE
&
THE CODES TRANSLATION COMMITTEE

EIBUN-HOREI-SHA, INC.
TOKYO JAPAN
1966

CHAPTER V UNLAWFUL ACT

(Unlawful act—compensation for damage)

Article 709. A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

(Non-pecuniary damage)

Article 710. A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

F.S.A. Sec. 95.10 (in effect when complaint was filed)

When the cause of action has arisen in another state or territory of the United States, or any foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state.

NEW YORK CIVIL PRACTICE LAW AND RULES. SECTION 214. ACTIONS TO BE COMMENCED WITHIN 3 YEARS: FOR NONPAYMENT OF MONEY COLLECTED ON EXECUTION; FOR PENALTY CREATED BY STATUTE; TO RECOVER CHATTEL; FOR INJURY TO PROPERTY; FOR PERSONAL INJURY; FOR MALPRACTICE OTHER THAN MEDICAL MALPRACTICE; TO ANNUL A MARRIAGE ON THE GROUND OF FRAUD.

The following actions must be commenced within 3 years:

* * *

(4) An action to recover damages for an injury to property.

* * *

Federal Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 801(d)(2)(B), (C) and (D)

The following definitions apply under this article:

(d) Statements which are not hearsay. A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

Federal Rule of Civil Procedure 44.1

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

UNITED STATES DISTRICT COURT
Southern District of Florida

No. 74-49-Civ-CA

Filed April 21, 1975

FURY IMPORTS, INC.
Plaintiff

vs.

SHAKESPEARE COMPANY, and SOUTHERN TACKLE DISTRIBUTORS
Defendants

THIS ACTION came on for trial before the Court and a jury, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court, having deliberated upon defendant's post-trial motions and thereupon rendering a decision granting the defendant's motion for judgment notwithstanding the verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that each party bear its own costs.

THIS 17th day of April, 1975.

JOSEPH I. BOGART, Clerk of Court

By /s/ MYRNA ROBBINS
Myrna Robbins
Deputy Clerk

APPROVED:

/s/ CLYDE ATKINS
United States District Judge

Fury-Ohmori Contract—filed September 19, 1974

AGREEMENT made this 15th day of December 1969, among KABUSHIKI-KAISHA OHMORI SEISAKUSHO, a corporation organized and existing under the laws of Japan, having its principal office at 7, Maeno-cho 5-chome, Itabashi-ku, Tokyo, Japan (hereinafter called "Ohmori"), SHINEI INC., a corporation organized and existing under the laws of Japan, having its principal office at Taimei Building, 32, 2-chome, Kanda, Jinbo-cho, Chiyoda-ku, Tokyo, Japan (hereinafter called "Shinei"), and FURY IMPORTS INC., a corporation organized and existing under the laws of the State of New York, having its principal office at 255 King Street, Staten Island, New York 10312 (hereinafter called "Fury").

WITNESSETH:

WHEREAS, Ohmori wishes to appoint Shinei its exclusive distributor throughout the world, except for Japan, for the sale of fishing reels as per samples and descriptions, to be known as "Diamond Spinmaster", in various styles, designated style numbers 1, 2, 3, 4 and 5 (all of which are hereinafter called the "products") samples heretofore delivered by Ohmori to Fury; and

WHEREAS, Fury desires to be the exclusive distributor for the entire Western Hemisphere; and

WHEREAS, Ohmori and Shinei desire to have Fury be the exclusive distributor for the Western Hemisphere and desire that Shinei have the exclusive distributorship for the Eastern Hemisphere except for Japan, which shall be the exclusive territory of Ohmori.

NOW, THEREFORE, the parties hereto agree as follows:

FIRST: A. Ohmori hereby appoints Shinei its exclusive distributor of the products, throughout the world, with the exception of Japan. Shinei hereby accepts such distributorship. Shinei appoints Fury as the exclusive distributor for the Western Hemisphere. Fury, Shinei and Ohmori have agreed upon a trade name, trademark or brand name, to wit: "Diamond Spinmaster". In the event said name is not available a new name will be selected which shall incorporate the word "Diamond". Fury shall have the exclusive right to use the trade name, trademark or brand name so selected in connection with the products. Ohmori shall manufacture and package the products with the name so selected. Except as to the name, all shipments of products of Ohmori shall conform with the samples heretofore delivered to Fury. Fury shall sell and advertise the products on such terms and in such manner as it deems best.

B. Fury may delegate or assign any or all of its rights hereunder, in whole or in part, to any persons, firms or corporations.

SECOND: Ohmori shall not, anywhere in the world with the exception of Japan:

(a) directly or indirectly sell the products, alone, or as a component of any fishing device, under the trade name "Diamond Spinmaster" or any other trade name, trademark or brand name selected, as provided in Paragraph "FIRST", or

(b) use the name "Diamond", alone or in conjunction with other words, in connection with any other fishing reel or fishing device.

THIRD: A. Ohmori shall not sell the products directly or indirectly, to any person, firm or corporation for resale directly or indirectly, outside of Japan, except Ohmori may sell the products to Shinei for export by Shinei to any part of the world, except for the Western Hemisphere.

B. Shinei shall not sell the products directly or indirectly, in the Western Hemisphere or for export to the Western Hemisphere.

FOURTH: A. All purchases by Fury hereunder for export to the Western Hemisphere shall be made through Shinei as distributor for Ohmori. Shinei shall not seek any compensation for its services as such distributor from Fury.

B. Ohmori shall not hold Fury liable for any purchases made by Shinei for export by Shinei in accordance with Paragraph "THIRD" hereof.

C. In the event that a breach of this agreement occurs or the agreement between Shinei and Ohmori terminates, it is agreed by all parties that nothing will terminate Fury's rights hereunder and Ohmori agrees to continue this distributorship just as if Ohmori had made the agreement in place of Shinei.

FIFTH: Ohmori represents that the products do not infringe any patent rights of any other person, firm or corporation, and agrees to hold Shinei and Fury harmless from the claim of any person, firm or corporation that the products do infringe such person, firm or corporation's patents.

SIXTH: Fury and, with respect to sales under Paragraph "THIRD" hereof, Shinei shall place orders with Ohmori for such quantities of the products as in the discretion of Fury and Shinei each may require from time to time. Fury and Shinei shall place orders for an aggregate of at least 150,000 of the products during the first year hereof. The purchase price, terms of payment, terms of shipment and other terms of sale shall be mutually agreed upon by Ohmori and Fury, or by Ohmori and Shinei with respect to sales made under Paragraph "THIRD" hereof, as set forth in each separate confirmed purchase order or sales order.

SEVENTH: This agreement shall remain in effect for a period of one year from the date hereof and shall continue in

effect from year to year thereafter, provided that Fury and/or Shinei shall place orders for at least 150,000 additional units of the products during the first year hereof or any renewal year, as the case may be, for delivery during the succeeding year.

EIGHTH: This agreement shall be governed by the laws of the State of New York, United States of America.

NINTH: Any controversy or claim arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in Japan in accordance with the rules of the Japan Commercial Arbitration Association. The award shall be final and binding on the parties hereto.

TENTH: This agreement shall be binding upon the parties hereto and their respective successors and assigns, and inure to the benefit of the parties hereto and the successors and assigns of Ohmori and Fury. It cannot be assigned by Shinei.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their officers thereunto duly authorized the day and year first above written.

KABUSHIKI-KAISHA OHMORI SEISAKUSHO

By _____

President

SHINEI INC.

By _____

FURY IMPORTS INC.

By _____

President

Shakespeare-Ohmor Contract—filed September 19, 1974

Memorandum on the meeting held at room 1572 at The New Otani Hotel
in Tokyo on Wednesday, June 10th, 1970

Present were:
Messrs. Shakespeare, Omori, Trewhella, Braunschneider, Unoki, Sugita, Watanuki, Rost.

BETWEEN

Mr. OMORI, representing OMORI Mfg. Co. Ltd., 75-7 chome, Maeno-cho,
Itabashi-ku, Tokyo, Japan
—in the following referred to as "Omori"—

AND

Mr. Watanuki, representing NORIS-Shakespeare Co. (Japan) Ltd., Room No. 335
7th Kohjimachi Bldg., 5-4 chome, Kohjimachi,
Tokyo, Japan
—in the following referred to as "NST"—

the following agreement was reached and concluded:

* * * * *

1.)
Omori will increase its capital stock by ¥ 8,000,000 (eight million Yen) from ¥ 40,000,000 (forty million Yen) to ¥ 48,000,000 (forty-eight million Yen). 16,000 shares par value ¥ 500 (fivehundred Yen) each thus totaling up a value of ¥ 8,000,000 (eight million Yen) will be issued immediately and sold to NST at par value against cash. ($22,200)

2.)
NST after becoming a shareholder of Omori desires to have Mr. Watanuki elected as a director on the board of the Omori company. Mr. Omori in his capacity as President of the Omori Company personally has no objection to this request, but wishes to discuss this subject and receive the approval of the current directors, whom he believes do not oppose.

3.)
This agreement is made to further develop a very close cooperation between Omori as a manufacturer of fishing reels and NST as a world-wide distributor. NST as the Japanese subsidiary of the Shakespeare organization with its headquarters in Kalamazoo/Michigan, U.S.A. and affiliates all over the world takes on full responsibility to sell fishing reels manufactured by Omori world-wide. The current production is estimated to be approximately 500,000 reels per year. For the first year of the cooperation, more precisely until the end of July 1971, Omori expects NST to sell a minimum quantity of 300,000 reels only, as Omori needs the rest of his capacity to fill other orders still on hand.

4.)
All reels Omori will manufacture for the Shakespeare organization should also be marketed on the Japanese domestic market. To accomplish this, NST will help Omori to establish their own sales department eventually, which also might be used by NST for export of non-branded products. It is desired to have this sales department to handle other Shakespeare products in the sporting goods field for the Japanese domestic market.

5.)
NST will sell in the first year two series known and established as "Dynamic Series" (three models) and "Europa Klasse Deluxe" (seven models).

6.)
Omori is permitted to continue the manufacture of four models he created for South Bend. However, it was agreed upon that

NST orders will enjoy preference at any time and that Omori will drop to manufacture reels for South Bend if NST desires so and places orders in quantities which require the full capacity of the Omori factory thus leaving no room to fill orders from South Bend. Whatever negotiation Mr. Omori will have with South Bend in the future, the directors of the Omori company and Mr. Watanuki in particular should be informed.

7.)

Omori currently manufactures a family of reels for the Japanese export company Shinei under the brand "Diamond Spinmaster". It was agreed upon that within a year from now on Omori will stop further supplies to this outlet and give up the production of these reels. To fill a possible production gap, the US Shakespeare company and Omori will start immediately to create, design and develop a most up-to-date series of fishing reels similar to the current Diamond Spinmaster to be distributed world-wide by NST. Details on this program were discussed between Messrs. Shakespeare and Omori. The tooling expenses for these new reels will be paid by NST. It is estimated that the amount will be approximately US-$11,000,- per model.

8.)

As Omori currently has some financial problems, NST promised to help overcome the situation. Shakespeare USA will establish a transferable Letter of Credit in favour of NST on which money can be borrowed at a very low rate of interest. Should Omori need additional financial help for short terms, NST will advance cash within its credit facilities, but Omori should give sufficient collateral security for any advance payments. Any risk Omori and NST have to undergo to make the future business a success should be equally shared by both parties.

9.)
NST desires Omori to improve continuously the management and productivity of his operation to cope with the steadily increasing competition. NST will offer any help within their power.

10.)
To protect the interests of all parties concerned, this agreement should not be announced to the public and trade before June 30th, 1970.

11.)
There is a clear understanding that the agreement reached and agreed upon should become effective immediately and that the necessary steps should be undertaken by each party to fulfil its commitment. Both parties and the other participants of the meeting consider the today's arrangement to be only the beginning of an even closer cooperation and association in the future.

TOKYO, Wednesday, June 10th, 1970.

.....
H. OMORI/President of
Omori Mfg. Co. Tokyo

.....
S. WATANUCK/Director
of Noris-Shakespeare Co.
(Japan) Ltd., Tokyo

Filed May 17, 1974
UNITED STATES DISTRICT COURT
Southern District of Florida

FURY IMPORTS, INC., a New York corporation,

Plaintiff,

vs.

SHAKESPEARE COMPANY, a Delaware corporation, and SOUTHERN TACKLE DISTRIBUTORS, a Florida corporation,

Defendants.

_____/

COMES NOW the Plaintiff, FURY IMPORTS, INC., and amends its Amended Complaint by adding the following paragraph:

19. The Plaintiff further says that the Defendants deliberately and willfully embarked upon a course of conduct, the result of which would be to dry up the plaintiff's supply of reels from Kabushiki-Kaisha Ohmori Seisakusho, the purpose being to eliminate a competitor; and the corporate records of Shakespeare Corporation, together with the language in the corporation, show a course of conduct by corporate officers of Shakespeare Corporation purposely designed to interfere with the contractual rights of plaintiff and ultimately to put the plaintiff out of business. That said actions on the part of Defendants were deliberate, willful and wanton.

WHEREFORE, the Plaintiff, FURY IMPORTS, INC., sues the Defendants for an accounting; for tortuous interference of the contractual rights; and demands compensatory and punitive damages in an amount in excess of $10,000; and demands trial by jury of all issues triable as of right by a jury.

LAW OFFICES
FRIEDMAN, BRITTON & STETTIN

September 11, 1974

Filed September 11, 1974

Edward S. Corlett, III, Esq.
Corlett, Merritt, Killian & Mascaro
116 West Flagler Street
Miami, Florida 33130

Re: Fury Imports, Inc. vs. Shakespeare Co., et al

Dear Ed:

This will confirm our telephone conversation in which I told you that if a question of choice of law arose between New York and Florida, I believe that the New York law would be applicable. You indicated to me that you were in accord with this principle. I also mentioned to you that Japanese law might be applicable. Accordingly, I want to put you on notice, pursuant to Rule 44.1, that an issue of foreign law may be involved in this case.

The precise issue of Japanese law involved is the absence, under Japanese law, of a right to claim punitive damages. We intend to present the Japanese statutes in this regard, as well as Mr. Sumio Takeuchi, who will testify that under Japanese law no punitive damages are allowable. In that connection, I am enclosing a photocopy of the English translation of the Japanese statutes.

In addition, I would like to get together with you some time prior to the trial so that we may exhibit to each other the various exhibits which will be used in this trial and have them pre-marked in accordance with the Court's suggestion.

Very truly yours,

JOHN L. BRITTON
For the Firm

UNITED STATES DISTRICT COURT
For The
Southern District of Florida

Filed June 9, 1978

FURY IMPORTS, INC., a
New York corporation

vs.

SHAKESPEARE COMPANY, a
Delaware corporation

This action came on for trial before the Court and a jury, Honorable C. Clyde Atkins, Chief, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff, Fury Imports, Inc., recover of the Defendant, Shakespeare Company, the sum of $931,391.00 (Nine Hundred Thirty One Thousand Three Hundred Ninety-One Dollars), with interest thereon as provided by law, and his costs of action.

Dated at Miami, Florida, this 9th day of June, 1978.

JOSEPH I. BOGART, Clerk of Court

by: _____
Rose I. Greene, Deputy Clerk

John L. Britton
Kenneth L. Ryskamp

James H. Geary
ATTORNEY AT LAW
300 THE KALAMAZOO BUILDING
KALAMAZOO, MICHIGAN 49007

TELEPHONE (616) 344-7386

May 2, 1980

Filing date unknown

Mr. Gilbert F. Ganucheau
Clerk of the United States Court of Appeals
for the Fifth Circuit
Room 102, 600 Camp Street
New Orleans, Louisiana 70130

Re: No. 78-2962—Fury Imports v. Shakespeare Co.

Dear Mr. Ganucheau:

Please call to the Court's attention the Opinion of the New York Court of Appeals in *Guard-Life* v. *S. Parker Hardware Manufacturing Corp.*

The Opinion was released May 1, 1980. One original and three copies of the slip Opinion are enclosed.

Mr. Glenn Backer, one of the attorneys for S. Parker Hardware, has advised me that there is a typographical error in the Opinion on page three. The year "1977", which is the third word in the ninth line from the bottom of the page, should be "1971."

Sincerely,

/s/ JAMES H. GEARY
James H. Geary

Enclosures

CC Kenneth L. Ryskamp

TRANSCRIPT OF PROCEEDINGS
[565] CIACCIA—DIRECT

* * * * *

Q. Now, Now, did there come a time, sir, when Mr. Schooler of Southern Tackle became concerned about that first shipment of Spinmaster reels, that it might dry up, if you know?

A. Yes, sir. All through this period during 1970 that is primarily what led up to the renegotiation of the contract with Southern Tackle.

[566] A. There was a period in 1970 where we had asked them to open additional letters of credit. We would ask them not to slow down, that it would be inadvisable to slow down and we were operating on information that we were getting from Shinei that Omori was in financial trouble.

Q. I'm speaking about, did there come a time when Mr. Schooler was concerned that Shakespeare might interfere with the delivery?

A. Yes. I was leading up to that.

It all happened in a very brief period of time. It started in the middle of June and it reached its resolution in October, November of 1970.

What happened was that we were at the tail end of one season and we asked for a slow-down. And we did not—the factory did not agree to the slow-down.

We opened additional letters of credit and we proceeded with the project as it had originally been set up, that was through July.

We opened the letters of credit or Southern Tackle opened those letters of credit that we asked to be opened.

We then went out to the Tackle Show [567] which is usually held in Chicago. And it is always held in the first part

of August as the National Trade Show for the fishing tackle industry and all prominent buyers and manufacturers and distributors are there.

It is the opening bell of the season. It is the first step of the following season. In other words, for the delivery the following year.

Q. Where is that tackle show located?

A. It is usually held in Chicago. They have now started to rotate the shows to other cities. This coming year it will be—in fact this year it will be in Atlanta.

But at that time it was only in Chicago.

* * * * *

THE WITNESS: Mr. Corlett, if I may, I did not finish my answer.

I got a little diverted by the tackle show. [568] You asked me about Mr. Schooler, what was happening at that time of the year and I started to explain it.

When we went out to the tackle show, Mr. Schooler came to me and he was very upset. He knew at that time that we all knew that Shakespeare had bought into the factory. We had been assured by Omori and Shinei that things could go on as long as we continued to order the reels, then we would have no problems.

That everything could proceed as before, and we accepted that.

We went to the tackle show and he came back to me and said, "Shakespeare had one of the Spinmaster reels in their booth. They were showing it and salesmen were talking about it and attempting to book orders.

"At least they were talking about booking orders on the reel."

And he wanted to know what was going on. He was very angry. And immediately after the show he came to me and said, "I'm not opening any more letters of credit to that factory until I know precisely what is going on. I am not investing any ..ore money, any of my company's money until I can be assured of a continuing delivery of the reel. If I am not going to get any more reels, let's quit right now. Let's stop right now."

We went then back to both Omori and Mr. Kobayashi of Shinei and asked them additional information. And they promised to send us a copy of the contract that they had signed with Shakespeare, and they never did that.

But in any case, we finally negotiated a new contract with Southern Tackle, which reduced their territory down to the southeast.

That was the contract that was signed in November of 1970. And they proceeded to open letters of credit and proceeded with the project.

* * * * *

Q. Now at this time, Mr. Ciaccia, did you have any idea or any inkling of why you were unable to get your deliveries?

A. I suspected that I was having trouble with Omori because of Shakespeare. We were getting feedbacks from customers and from salesmen. And it started early way back in 1970. But it increased, particularly at the show in 1972.

* * * * *

Attorney Corlett—Comments to Court

Mr. Corlett: Only in the year 1970. And then when the contract was modified—we are not going to ask for damages for that particular year, for whatever it is worth to the Court.

The Court: You did the last time.

Mr. Corlett: I know. It is insignificant and we don't want to get into an argument over that amount of damages as it is opposed to the total picture, but only for that one customer. But as far as Mr. Ciaccia's other customers were concerned, he was on the exact same basis as Southern Tackle would have been.

Morganstern—Direct

* * * * *

[959] "Q. Now, let me get back to your records again. Now, in 1970, sir, did you compute from the records that you have just testified the average prices for model reels, the average profit earned for model reels 1 through 5?

A. Yes."

* * * * *

[960] "Q. The average difference between the price that Fury paid, the duty, the landed in price, [961] and the price that Southern Tackle paid?

A. Yes.

Q. What was the average difference per reel?

A. Twenty-six cents per reel.

Q. Now, sir, in looking at the records, can you tell me how many reels were shipped during the year 1970?

A. 114,126.

Q. Now, can you tell me how many reels were shipped that particular year?

A. 114,126.

Q. Now, sir, it is a simple mathematical computation, the difference between the reels ordered and the reels shipped for this jury. You testified to the amount ordered, did you not?

A. Yes, sir.

Q. I thought you did. Now, how much was ordered, according to those orders?

A. 150,000.

Q. Now, did you subtract the 114,126 from the 150,000?

A. Yes, sir.

Q. How many reels did you come up with for that particular year?

[962] A. Unshipped 39,974.

Mr. Corlett: I believe that is a misprint.

Mr. Britton: It is.

Mr. Corlett: I believe the correct answer is 35,874.

* * * * *

Q. Now, sir, can you tell me, when I asked you how many reels were not shipped, and I asked you what the average difference was between the duty landed costs and the average selling price, what is the significance of the amount of reels unshipped?

A. That is the potential profit that was lost.

[967] Q. Sir, in order to arrive at the calculation of the difference between the duty landed cost paid by Fury and the average selling price, what did you multiply?

A. I multiplied the difference between the receiving costs and the selling cost times the number of reels unshipped.

[1234] Proffer Re: Japan's Law

(Jury Not Present)

THE COURT: Good morning, gentlemen.

MR. BRITTON: Your Honor, I have Mr. Takeuchi, a Japanese lawyer, standing by. If there is no question as to

punitive damages which are allowable under Japanese law, I would like to send him back today.

THE COURT: Is there any dispute about that point without conceding the applicability of it?

MR. CORLETT: My answer is that I don't know.

THE COURT: You would like to hear it?

MR. CORLETT: I certainly would not like to rely upon what certainly a biased witness would say—

MR. BRITTON: Counsel, you stipulated at the last trial—

MR. CORLETT: I would like to see the stipulation.

MR. BRITTON: You stipulated that there were no punitive damages in this case.

MR. CORLETT: I did not stipulate to such [1235] thing. All I did was accept his proffer.

In other words, he put on a proffer, that if Mr. Takeuchi would have been permitted to testify as to Japanese law he would testify that there was no concept on punitive damages under Japanese jurisprudence. And I just accepted his proffer in lieu of Takeuchi's testimony.

MR. BRITTON: Well, he is available.

THE COURT: You are offering the same proffer now?

MR. BRITTON: Yes, Your Honor.

MR. CORLETT: And I will accept that same proffer for whatever it is worth to this lawsuit.

THE COURT: All right.

MR. BRITTON: It is stipulated that if he were called to testify he would testify that there is no concept on punitive damages under Japanese jurisprudence.

MR. CORLETT: If Mr. Britton makes that representation, I assume that is what he would testify to.

THE COURT: Do you accept that proffer?

MR. CORLETT: In other words, I accept that that is what the man would say if he got up on the stand. I certainly don't mean to say I believe it.

* * * * *

[1286] SUMIO TAKEUCHI was called as a witness on behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

THE COURT: State your name and occupation.

THE WITNESS: My name is Sumio Takeuchi. My occupation is lawyer, practicing in Tokyo, Japan.

[1287] *Direct Examination By Mr. Wildman:*

* * * * *

Q. Mr. Takeuchi, under Japanese law, is there any provision in the code for punitive damages, the concept of punitive damages?

A. There is no concept of punitive damages provided for in our civil court.

Q. Is that situation true now and has it been true since 1970?

[1288] A. Yes.

Q. Was it true in 1969?

A. Yes sir.

Q. Is there any provision or concept of punitive damages in your precedent or substantive law?

A. No, sir.

* * * * *

[1289] Q. Now, would you advise the Court as to what provision in those respective exhibits relates to the subject of punitive damages or damages if at all.

A. Well, our code has the provision for damages to arise from tortious actions in Chapter 5, starting from civil law 9 and ending at 724. And there is no provision providing for punitive damages.

* * * * *

[1973] *Proffer of Admissions*

* * * * *

THE COURT: You can proffer it.

MR. WILDMAN: May I make a proffer? It is only a paragraph, Your Honor.

THE COURT: Let's get it down.

MR. BRITTON: This is page 1128. This is a statement by Mr. Corlett.

> "The plaintiff would like to move for a directed verdict and would like the Court to consider that argument has been made—"

MR. CORLETT: Your Honor, do you want the Court's ruling, the Court's prior ruling?

MR. BRITTON: Let me finish.

> "I feel, Your Honor, that we certainly are entitled to a directed for the year 1970, beyond any question, based on Omori's testimony. I feel that we are entitled to one on the issue of breach of contract. There are other issues, but I don't want to waste the Court's time because I know the Court is going to let it go to the jury."

Now, Your Honor, page 1166, which is part of closing argument.

"Now, 1970 was the year that we had not so much profit as the testimony shows. That was the year we had Southern Tackle developing our reel, putting on a substantial advertising program and getting the reel known, getting ready to market that reel and market it properly. We only were getting 26,000 reels. We claim, and the accountant so testified, that they failed to ship 35,874 reels. We claim our damages in the year 1970 were $9,327.24. You can round it off in even figures as far as I am concerned. I am just doing this to be precisely accurate."

THE COURT: Well they do not even have 1970 before the jury.

MR. CORLETT: No, sir, we do not have 1970 before the jury. We, of course, withdraw that claim.

THE COURT: You don't think that they can withdraw it if they want to?

MR. BRITTON: I am objecting to it, Your Honor.

MR. CORLETT: Do you have the same objection to the subsequent years, Mr. Britton?

MR. WILDMAN: We would offer both, as I understand it, Mr. Britton, those two excerpts separately. And they are offered for the purpose of introducing an admission made by the plaintiff. And they are offered obviously, as the Court is well aware, with the theory in mind that this entire claim is barred by the statute of limitations. The inducement or the interference occurred in 1970. The breach occurred in 1970. And even if plaintiffs would argue that you must have damage in the period in question, the damage occurred in 1970.

So any way you look at it, there was a so-called interference, there was a breach, according to the plaintiff's theory, and there was damage in 1970, which is more than three years prior to the commencement of this action.

* * * * *

[2005] Instructions Conference

THE COURT: Well actually 1970 is not in dispute any more.

MR. RYSKAMP: It is to this extent, that if the contract was breached during 1970, we would not be talking about the rest of the year. So what we are talking about is that 1970—and that is why it is not in dispute, Your Honor—we ordered 150,000 reels. Southern Tackle was to take these reels and there is no dispute as to that.

Now we will get into the Statute of Limitations a little later.

* * * * *

[2006] THE COURT: What you are saying is that 1970 is not in dispute, that it was in effect during that year because it is undisputed that they had ordered 150,000?

MR. RYSKAMP: Right.

THE COURT: And it is an issue as to whether or not he ordered 150,000 in subsequent years.

Now, does defendant concede this?

MR. WILDMAN: No, Your Honor.

THE COURT: Well, is there an issue about 1970 in the minds of the defendant?

MR. GARY: Yes, Your Honor, there is a dispute as to 1970.

* * * * *

[2016] MR. RYSKAMP: This solves one problem "acceptance". But it does not get to the problem that we were first talking about, and that is the fact that there is evidence in the record other than the year 1970 that 150,000 reels were ordered. And I think the Court ought to tell the jury at the top

of No. 12 that the contract was valid and enforceable by the year 1970 by the placement of orders of 150,000 for that year.

[2017] Now for the years '71, '72 and '73, that is another ball game. There is a question as to the facts there. There is no dispute as to 1970 and I think that you were asking counsel about that.

MR. GARY: Your Honor, there is a dispute as to 1970. I think that if there was an agreement as to the terms of shipment for each of those 150,000 reels, if there had been, they would have been shipped.

MR. RYSKAMP: The order was there for every year. And here they put into evidence a Shinei exhibit, which is their exhibit, which orders a quantity of reels and the testimony was that these were only written orders, 150,000 pieces and that is Exhibit 24a.

MR. GARY: Your Honor, there has been a dispute as to what is meant by "orders" all throughout the trial. Does it mean stock orders or does it mean orders for shipment, the kind of order that the contract specifically refers, talks about orders and delivery of reels, stock orders.

[2019] There is an indication by the plaintiff that some time during the year that they will be getting together on the terms of shipment, etc. You have heard testimony they placed so-called orders which never related to the shipment of reels, because the plaintiff never asked Omori to send them.

I do not think that the plaintiff can take the year 1970 out of dispute simply because it is beyond the statute of limitations.

Mr. Ryskamp: This has nothing to do with the statute of limitations.

* * * * *

[2034] Your Honor, what you have done here is to really define breach. If you have read our written objections, we feel that the Court should instruct on the definition of interference

and as I read the third paragraph of No. 22, you just define breach.

[2035] THE COURT: I am going to come to your proposals in just a moment.

Do you think "anticipatory" should be included in here? Does the plaintiff agree to that?

MR RYSKAMP: I fail to see how anticipatory breach is involved in this lawsuit. I do not see how it is involved from our standpoint in that we did not have to order reels for 1974 because Omori said that they wouldn't deliver them.

* * * * *

[2049] MR. GARY: Your Honor, I think interference should be defined.

MR. RYSKAMP: I don't know what you have accepted. [Sic]

THE COURT: He is now not insisting upon the actual change in 10, because I have defined breach.

Now we go to No. 4—I'm sorry, No. 10a, item 4.

MR. GARY: Basically, the same thing, Your Honor. I still think it will be better to define interference rather than the word breach.

[2050] THE COURT: I do define it, do I not?

MR. RYSKAMP: It is not only interference, but it is inducing a breach. And if we don't use the word "breach" Your Honor, it is going to seriously limit our position. We are saying that they caused Omori to breach the contract.

MR. GARY: That is not what they said in their complaint. They said "engage in a course of conduct purposely designed to interfere with—"

THE COURT: The Fifth Circuit talks about procuring a breach.

MR. RYSKAMP: All through the opinion they talk about tortious interference.

MR. GARY: The reason it makes a difference is because of the statute of limitations argument. And the Court of appeals says that there were going to be new issues raised in the trial dealing with the statute of limitations question and when the statute begins to accrue.

THE COURT: I will overrule numbered paragraphs 4 and 5. * * * [2051] And we are going to eliminate any dispute regarding 1970.

* * * * *

[2054] THE COURT:

* * * * *

Now, we have defined breach of contract.

MR. GARY: I think that that should also include anticipatory breach. I think the cases of Hanrahan vs. Parker and Hagen vs. Medical Society deal with that.

MR. RYSKAMP: I would take sharp issue with that. Hagen and Hanrahan say, or they key it to the breach of the contract and not to the inducement.

MR. GARY: I know it is getting late. But I think it is a very important point. The breach complained of was the signing of a contract where one party agreed that he would not perform another contract and the court said that it was a breach—

MR. RYSKAMP: Except that it totally ignores what the Fifth Circuit said. The Fifth Circuit in the last paragraph says that the jury may use—

THE COURT: Isn't it actually taken care of by our No. 22 which deals with the defense of the statute of limitations?

MR. RYSKAMP: Right.

MR. GARY: Only part of your No. 22. It doesn't tell the jury that they should know that Omori is saying on June 10, 1970 that he wasn't going to perform a contract with Fury which could constitute a breach. It plainly would be actionable. I think that the jury should be told that Omori's signing of the June 10, 1970 contract could be a breach.

[2055] MR. RYSKAMP: The only difference is that in the Shirley McLain case, when she signed the contract with the new agent, she in effect immediately breached the contract. And in this case Omori said "a year from now I will breach."

And what if a year from then Omori didn't breach. We still wouldn't have a cause of action.

THE COURT: I will overrule the proposed objection and I will follow 22 as worded.

Now we go to page 23.

MR. GARY: Your Honor, we have just suggested a more extensive instruction on damages which would include measure of damages and include an instruction that would make the Brunswick testimony sensible to the jury. I think that our porposed instruction accurately states the law as related to the facts that have been introduced at trial. And think that we are entitled to it.

THE COURT: 23 through 28 you want given?

[2056] MR. GARY: Yes, sir. We are asking that our instructions 22 through 28 be given to supplement the Court's.

MR. RYSKAMP: I think that the Fifth Circuit has dealt with the issue of damages.

THE COURT: Now if you will note No. 23 states that he will not recover for conjecture and speculative damages—

MR. GARY: That sentence is redundant, Your Honor.

THE COURT: I think 24 is comment on the evidence. That is defendant's proposed 24.

MR. GARY: Well, Your Honor, if you think it is comment on the evidence, then I would ask you to rework it. The gist of what we are trying to have the jury instructed on there goes to liability. We want the jury told that if they find that Fury would have entered into the Brunswick deal and not have been ordering any reels from Omori or if they would have removed the dies and molds from Timko, then they cannot complain because Omori didn't ship.

THE COURT: I will overrule 23 through 28.

* * * * *

[2063] MR. GARY: Those are all of the written objections that we pointed out. And No. 5 implies that the only way that there could have been a breach was by failure for Omori to ship reels. And there could have been a breach by permitting Shakespeare to be a distributor of his reels and there could have been a breach in 1970 by saying that he would not perform the contract.

The Court's charge No. 5 at least implies to the jury that the only way a contract could be breached would be for Omori to refuse to ship reels.

MR. RYSKAMP: No. 6 has taken care of that.

MR. GARY: I have the same objection to No. 6. Both of them imply that the only way there could have been a breach was for Omori to refuse to ship reels.

THE COURT: This is the language that was used the last time.

MR. GARY: Your Honor, the statute of limitations the last time was not argued vigorously.

MR. WILDMAN: Your Honor, I don't think that there was any evidence the last time of the reels being displayed and Shakespeare taking orders in August of 1970 or booking orders.

[2064] MR. RYSKAMP: Yes, there was.

MR. GARY: Your Honor, we have the Court of Appeals opinion right here. It says "because the case must be remanded for a new trial anyway, and because the statute of limitations question may raise issues that were not considered at the first trial, we do not think that we should pass on these questions at this time."

Your Honor, the Court of Appeals plainly indicated that the issue was not gone into before the last time and should be this time. It could be any breach. And the jury ought to be told that any breach starts the statute of limitations.

MR. RYSKAMP: I fail to see how the question has anything to do with the statute of limitations. It is totally a different issue.

* * * * *

[2065] THE COURT: I will overrule the objection and I will use the draft previously prepared with modifications that I have already announced. And we will adjourn now until 9:30 tomorrow morning.

Fury—Motion for Directed Verdict

MR. RYSKAMP: Your Honor, I do urge the Court to rule as a matter of law on the question of the statute of limitations under these grounds. I will just argue it briefly.

We had a contract dated in December of 1969. The Court has already ruled that the contract was valid and enforceable for 1970.

On June 10, 1970 the inducement occurred whereby Omori would agree to terminate within a year and within a year would be like June of 1971.

Now if it had occurred in June of '71, there is no question but that our suit would have been timely filed because we

would have been well within three years. The only evidence in this case that indicates that Shakespeare did nothing during that first year to interfere with the shipment of reels to Fury. The first correspondence dealing with the Fury shipment was in July of 1971.

[2066] Now the only way that confusion came was because of the special verdict that required damages for each year.

We ordered 150,000 reels to be delivered in 1970. Now Omori, the evidence shows, could not ship them fast enough. He shipped us 118,000 in 1970 and the balance of them were delivered later. We do not blame Shakespeare for Omori's late deliveries. The only reason that we had damages for 1970 the last time was because the special verdict required the jury to put down the shortage for 1970. And we considered these reels to be back ordered. And we have never contended, nor is there one word of evidence to show that we were denied any reels in 1970, or for that matter, any reels after the middle of 1971, by Shakespeare's interference.

The only evidence in the case was that Omori could not meet its delivery schedule. And I do not think that there is an issue of fact for the jury to decide. And I would request Your Honor to rule as a matter of law that the case was timely filed inasmuch as there is no evidence that any damage resulting from interference by Shakespeare prior to the year 1971.

THE COURT: Well, if all you say is correct, would there be any harm in having the jury answer the question?

[2067] THE COURT: Well, if all you say is correct, would there be any harm in having the jury answer the question?

MR. RYSKAMP: Well, if Your Honor would reserve on that. I could see where you might want to submit that to the jury subject to later argument on these legal questions. But I

want to reserve or preserve the record on that. I don't want to be in a position of agreeing to have the jury decide it without a formal request to the Court to decide it as a matter of law.

MR. GARY: Your Honor, I don't think that they are withdrawing their claim of 1970—I don't think that they can do it under rule 41. I think that the issue has been joined. I think that it would take our consent to withdraw that claim and we do not consent to it. They have argued that we interfered in 1971 and 1970. And Mr. Corlett asked for a directed verdict the last time. Morganstern testified that there were some 9,000 unshipped reels. And Mr. Corlett argued that at the last trial, about the slowed-up delivery in 1970. Now they have discovered that it is going to mean that their cause of action is barred, and maybe they are going to decide that they weren't damaged in 1970.

[2068] I think the issue is before the court and I think the jury ought to have it.

THE COURT: I'm giving it to them. I will reserve.

* * * * *

MR. GARY: I just have one thing in particular and that is No. 33. When you redefined breach or substituted that page, you didn't define damages. And if the jury is going to be asked about damages, they ought to be told what it is that was added later.

THE COURT: A definition of damages. Does the plaintiff have any objection to that?

MR. GARY: That the plaintiff must have suffered damages, I do not mean necessarily that the plaintiff must have lost money and not received reels, but an invasion of the party's rights constitutes damages. As a general rule, whenever there is a breach of an agreement or an invasion of one's rights, the law presumes that some damages have occurred.

[2069] MR. RYSKAMP: Your Honor, that is just another way of saying that the inducement causes the cause of action.

That may be true in personal injury matters, but certainly it is not true in this type of case.

MR. GARY: It certainly is, Your Honor. Interference with contractual rights causes damages. It is tort, just like an automobile accident case.

MR. RYSKAMP: Well, in the Norge case, as we have cited in our memo, it says that damages are an essential element to the cause of action.

MR. GARY: So let's tell them what the damages are—

* * * * *

[2109] MR. GARY: I think Federal Rule of Evidence 801(d)2, admission by a party opponent. Mr. Corlett is obviously an agent of the party, he would not be here if he were not. It says, "includes a statement by a person authorized by a party to make a statement concerning the subject."

Mr. Corlett was here in the courtroom in an authorized capacity and the reason that he was here was to make a statement to the Court and to the jury. And I think it is a statement in which the plaintiff has manifested his option and belief. The plaintiff has represented to the Court at the time that those statements were made by two officers of the corporation and that Mr. Ciaccia and Mr. Tucker did not stand up and say that it was wrong or incorrect. They let it pass after Mr. Corlett made it.

And I think an admission of a party, both because Mr. Corlett said it, and because the plaintiff was here by its officers, did not contradict it when they could have been expected to—

THE COURT: The statements were made in closing argument?

[2110] MR. GARY: One statement was made in the absence of the jury and the other was made in closing argument.

THE COURT: You are not seeking to have it admitted for consideration by the jury?

MR. WILDMAN: Yes, Your Honor. We seek to have them admitted, particularly the second one, both of them to the jury. It is an admission. You see, this is vital to the defendant's case on the statute of limitations and it is very important. And we have felt all along that it is a legal question for the Court to decide. The Court has ruled that it is a question of fact, so we propose to argue to the jury that they, in 1970, knew about the interference and (b) knew about the breach, and (c) claimed damages for it. So regardless of what view you take of the New York cases, there has to be interference, a tort, a breach, which is induced by the defendant and damages flow from it. And we think this conclusively shows that all three of those things—we don't think that you have to have all three—but all three of them happened in 1970. And therefore as a matter of law, it is barred.

Now the Court has not seen fit to accept that position, so then it becomes a question of fact. That we are entitled to argue to the jury that, (a) they knew there was an interference and, (b) they knew there was a breach and, (c) they claimed damages for that period of time.

[2111] THE COURT: Well of course you do plan to argue whatever facts are in evidence that might support that.

MR. WILDMAN: What stronger facts could there be on behalf of a client in final argument for counsel to make a claim for $9,000? What stronger fact could there be with their clients present? Regardless of the fact that there is other evidence of damages, we are entitled to put in all of the evidence that bears on the issue if it is otherwise admissible. And I think it is very prejudicial, Your Honor, if it is excluded.

THE COURT: I will hear from you, Mr. Ryskamp.

MR. RYSKAMP: Well, first of all, what a lawyer says is not evidence. But secondly, the most dangerous part of it would be—it would be a total distortion of the facts. If we had a general verdict we would never have to allocate damages for the year. What we are doing is that you have to say how many were ordered for such and such a year and how many were received and the difference would be the damages. We didn't sustain damages in 1970. We didn't sustain damages until 1973 because the testimony was that all of these reels were back-ordered. And so, if we put that in we have to put in his whole argument, because he takes one little line and takes it out of context and tries to say that we are claiming damages that we sustained in 1970. Nothing could be further from the truth.

[2112] We are claiming now for the loss of reels that we did not get because of back orders. So I think it would be terribly prejudicial to do that.

MR. WILDMAN: Your Honor, they are claiming damages. And Mr. Corlett said in his final argument "we suffered and we claimed damages for 1970 and we suffered damages in the year 1970 and we claim damages for that year."

Now that isn't a question of whether it was suffered later. They said that they suffered them right then and there.

THE COURT: I will not permit it to be argued to the jury, but for any post trial motions and so forth, I will give consideration to the positions claimed by the defendant in respect to these arguments. It may come under 801 or it may not. But I am not excluding it from the record insofar as post trial considerations are concerned.

[2113] MR. WILDMAN: That is correct, Your Honor. But we are not permitted to argue it.

THE COURT: You are not permitted to argue in terms of saying that Mr. Corlett at the last trial argued this. I think that

that is frocked with prejudicial aspects. And even though it might be relevant, I think 403 would permit me to exclude it.

* * * * *

[2152] Atty Corlett—Final Argument

* * * * *

We haven't asked for damages in the year 1970 because we got our order that year. I think we missed about 30,000 reels that were back ordered the following year, but the contract did not call for the breach in 1970. And we are not claiming a breach at this time during the year 1970.

* * * * *

[2269] Verdict

* * * * *

(The following transpired in the presence of all counsel and the jury):

THE COURT: Good afternoon, ladies and gentlemen. Have your arrived at a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Mr. Marshal, will you accept the verdict, please.

Mr. Clerk Pro Tem, will you read the verdict.

THE CLERK: "Special Verdict"

"1. Was the contract extended through the year 1971 by the placing of orders for that year in accordance with the terms of the contract with the Omori Coporation for at least 150,000 units of the spinning reel in question?

"Yes yes No ____

"2. Was the contract extended for the year 1972 by the placing of orders for that year in accordance with the terms of the contract with the Omori Corporation for 150,000 units of the spinning reels in question?

[2270] "Yes yes No ____

"3. Was the contract extended for the year 1973 by the placing of orders for that year in accordance with the terms of the contract with the Omori Corporation for 150,000 units of the spinning reels in question?

"Yes yes No ____

"4. Did the Omori Corporation exercise a lawful right by refusing to supply spinning reels for the plaintiff by reason of the failure of the plaintiff to comply with the term of the contract?

"Yes ____ No no

"5. Did the Omori Corporation breach its contract with the plaintiff by wrongfully refusing to supply the spinning reels in question for the years in which the contract was in full force and effect?

"Yes yes No ____

"6. If your answer to Finding 5 above is 'yes', was the breach by the Omori Corporation of the said contract proximately caused by the defendant, Shakespeare Company, inducing the Omori Corporation to refuse to supply the reels?

"Yes yes No ____

[2271] "7. If your Finding to 6 is 'yes,' did the first breach by Omori that was proximately caused by defendant Shakespeare Co.'s inducement occur before or after January 15, 1971?

"Before ____ After ____

"8. If your answer to Finding 7 above is 'yes,' was the defendant Shakespeare Company justified in inducing the breach of contract?

"Yes ____ No ____

"9. If your answer to Findings numbered 5 and 6, and any of 1, 2 and 3 is 'yes,' and your answer to numbers 4 and 8 is 'no,' state the amount of any compensatory damages sustained by the plaintiff in each of the following years:

"a. 1971 $ 28,520

"b. 1972 $ 91,429

"c. 1973 $ 50,746

"d. 1974 $160,696

"e. 1975 ____

"f. 1976 ____

"g. 1977 ____

"h. 1978 ____
(through May)

"10. If your answer to Findings numbered 5 and 6 and any of 1, 2 and 3 is 'yes,' and your answer to numbers 4 and 8 is 'no,' answer the following question: Was the defendant Shakespeare Company guilty of wanton, willful misconduct in effecting such breach?

[2272] "Yes yes No ____

"11. If your answer to number 10 above is 'yes,' please insert the amount of punitive damages below.

"$600,000.

"SO SAY WE ALL.

s/

FOREPERSON

"DATED June 7, 1978, at MIAMI, FLORIDA."

* * * * *

Appellee's (Fury's) Brief—Second Appeal

Shakespeare argues that the lower court should apply the rule of *lex loci delicti*[2] but fails to explain why this rule should be applied only to punitive damages and not to the elements of the cause of action itself.

* * * * *

[2] Shakespeare urges that the conflict law of Florida would apply but, under the parties' stipulation, the conflict law of New York would be applicable.

Appellant's (Fury's) Brief—First Appeal

The plaintiff submits that the case of *Hannigan* v. *Sears, Roebuck and Co.*, 7 Cir. 1969, 410 F.2d 285, is almost on "all fours" with the instant case.

80-1089

No.

in the

Supreme Court

of the

United States

OCTOBER TERM 1980

SHAKESPEARE COMPANY, a Delaware corporation,
Petitioner,

vs.

FURY IMPORTS, INC., a New York corporation,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

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OCTOBER TERM 1980

SHAKESPEARE COMPANY, a Delaware corporation,
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vs.

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Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Fury Imports, Inc., a New York corporation, responds to the Petition for Writ of Certiorari filed by the petitioner and directed to the decision of the United States Court of Appeals for the Fifth Circuit dated September 8, 1980, with rehearing denied December 3, 1980.

STATEMENT OF JURISDICTION

The petitioner indicates that this petition is taken pursuant to 28 U.S.C. §1254(1) providing for writs of certiorari to the United States Courts of Appeals. This court has adopted Rule 19(b), Rules of Supreme Court of the United States, indicating the following considerations for exercising discretionary review over the United States Court of Appeals:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is evident from the most summary review of the Petition for Writ of Certiorari that the petitioner fails to comply with these jurisdictional requirements. The petitioner raises no constitutional issues. The petitioner cites no federal statutes. The petitioner cites two rules of evidence and one rule from the rules of procedure. One rule of evidence (403) grants to the trial judge broad discretion while the other rule of evidence (801) was never cited by the court of appeals. The rule of procedure (44.1) was never cited by the court of appeals.

The respondent respectfully submits that there is no basis for jurisdiction in this court and that the issues presented are issues only between the parties hereto and are not issues of substantial public interest. In effect, the petitioner has taken a second appeal to this court.

STATEMENT OF THE CASE

This cause has been tried twice by the district court and considered twice on appeal by the court of appeals. It would serve no useful purpose to submit a lengthy detailed analysis of all the facts and proceedings in the lower courts. The statement of the case submitted by the petitioner is substantially correct as to procedural facts but erroneous as to conclusions of law. The respondent will make further reference to the facts and issues in the argument portion of this brief.

REASONS FOR DENYING THE WRIT

I.

APPLICATION OF JUDICIAL DISCRETION UNDER FEDERAL RULE OF EVIDENCE 403 PROVIDES NO BASIS FOR SUPREME COURT JURISDICTION.

The petitioner's premise is that this court has not decided a case dealing with Federal Rule of Evidence 403 since the rules were adopted. This is an erroneous statement. In *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 and *Norfolk and Western Railway Company v. Liepelt*, _____U.S._____, 100 S.Ct.

_____, 62 L.Ed.2d 689, this court upheld the broad judicial discretion given under FRE 403. There is no hint from these decisions that this court is about to limit the discretion of the trial court under FRE 403.

There was good reason for the ruling of the district judge and the court of appeals. In the first trial the trial judge required the damages to be computed on an annual basis (32a). Thus, if 150,000 reels were ordered for 1970 (for example), and 150,000 reels were not received in that year, the damages for 1970 were computed on the deficiency. The facts indicated that reels were being shipped constantly and it would be difficult to determine which reels applied to which order. The contract was not terminated until 1973. The trial judge felt that a remark by counsel referring to damage allocations under the special verdict should not be distorted into something it was never intended to be (84-85a).* The facts indicated that the remark would be misleading and confusing to the jury (84a). The court of appeals agreed with the trial judge's exercise of discretion under Federal Rule of Evidence 403 (8a). This court does not review discretionary evidentiary rulings after the court of appeals has found no abuse of discretion.

*Reference is to petitioner's appendix.

II.

FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2) WAS NEITHER VIOLATED NOR CONSIDERED BY THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS PROVIDED NO BASIS FOR THIS COURT'S JURISDICTION.

Federal Rule 41(a)(2) relates to the dismissal of actions by a party. It does not deal with the question of damages. In the first opinion of the court of appeals, it was noted (35a-footnote 16):

> "Shakespeare can be held liable only for those breaches by Omori that it induced. This is a substantial point on the facts of this case. For instance, there was evidence that Omori was in financial trouble in 1969-70, which might have affected its capacity to produce reels. In addition, it is possible that Omori breached the contract in part even before it entered the agreement with Shakespeare under which it agreed to stop dealing with Fury."

At the second trial, respondent concluded that the shortages in 1970 resulted from Omori's production problems and not Shakespeare's interference. Since even Shakespeare conceded that the interference took place on June 10, 1970, and called for action by Omori one year later, it was difficult to conclude that the shortages in 1970 were the result of Shakespeare's interference.

The trial judge never applied Rule 41(a)(2). The court of appeals never referred to the rule. It is axiomatic that this court cannot consider a matter not considered below.

III.

DISTRICT COURT PROPERLY FOLLOWED THE "LAW OF THE CASE" RULE WHEN RETRYING THIS CAUSE AFTER OPINION AND MANDATE OF THE COURT OF APPEALS.

The petitioner fails to present the true facts in this cause. At the first trial, the trial judge held that New York law governed the question of punitive damages. After the verdict, the trial judge held that punitive damages should not have been awarded, again applying New York law (46a). On appeal, the court of appeals reversed the judgment n.o.v., and held that under New York law punitive damages were properly awarded but, since a new trial was required on compensatory damages, a retrial was also required on punitive damages (35-38a). On the first appeal, Shakespeare raised the question of whether Japanese law governed the punitive damages issue (see A 1-2).* The court of appeals rejected this argument and held that the trial judge properly applied the parties' stipulation of New York law (39a-footnote 19). At the second trial, Shakespeare again tried to inject Japanese law into the punitive damages issue (48-49a, 70a). The trial judge properly followed the opinion and mandate of the court of appeals (12a). When this issue was raised in the second appeal, the court of appeals held that the trial judge correctly followed the first opinion (3-4a).

The foregoing events indicate that both the trial judge and the court of appeals were entirely correct. There is no further issue for this court to consider.

*Reference is to respondent's appendix.

IV.

THE COURT OF APPEALS PROPERLY FOLLOWED THE STATE LAW OF NEW YORK IN RULING THAT THE STATUTE OF LIMITATIONS DOES NOT COMMENCE UNTIL A BREACH OCCURS.

The court of appeals held that the statute of limitations does not begin until a cause of action accrues. The court held that a cause of action does not accrue until a breach occurs, citing numerous New York decisions (4-8a). After the decision in the second appeal, the petitioner called to the attention of the court a recent New York decision in *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 NE2d 445 (1980). The court of appeals carefully considered this decision and concluded that this new decision did not change the existing New York law that a cause of action accrues only when there is a breach (9-10a).

The petitioner's reliance upon *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3, is misplaced. The *Challoner* case dealt with a federal court in a diversity action refusing to apply the state's choice-of-law rules to a personal jury claim which occurred in Cambodia. In the instant case, the court of appeals considered the recent New York case *(Guard-Life)* and found that it did not change the New York rule that the cause of action did not accrue until there was a breach of contract by Omori. The court of appeals' interpretation of the New York law was correct and provides no basis for jurisdiction in this court.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be summarily denied.

Respectfully submitted,

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Appendix

EXCERPTS FROM SHAKESPEARE'S APPELLEE-CROSS APPELLANT'S BRIEF IN CASE NO. 75-2421 (PAGES 46-47)

B. If Japanese Law Applies As To Punitive Damages, It Precludes An Award Of Punitive Damages In This Case.

At trial, Shakespeare offered to prove that the concept of punitive damages was entirely absent from Japanese jurisprudence, and Fury's counsel accepted the proffer, App. 919-c, Tr. p. 964, waiving any objections.

The issue of applicability of Japanese law to the punitive damage issue was clearly reserved in the stipulation of the parties that the New York law was the law of the forum, and was brought to the attention of the Court through a Motion to Strike filed on September 11, 1974. (App. 29-33, R. 297-301). Certain Japanese statutes, in English translation, were appended to Shakespeare's Motion, and are set forth in pertinent part, in the Addendum, Par. I. Shakespeare argued that the Court was bound to apply Florida's choice of law rules, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Gillies v. Aeronaves de Mexico, S.A.*, 468 F.2d 281 (5th Cir. 1972), *cert. denied* 410 U.S. 931 (1973); and that Florida's conflict of law rules mandated the Japanese law as the law applicable to the punitive damage issue, *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, *rev'd on rehearing*, 201 So.2d 749 (Fla. 1967); *Kilmer v. Gustason*, 211 F.2d 781 (5th Cir. 1954). See also, *Franklin Supply Co. v. Tolman*, 454 F.2d 1059 (9th Cir. 1972) (in an action brought in U.S. District Court in California

against an accounting firm for a faulty audit in Venezuela, held, alternatively, California law governed choice of law of punitive damages; under California's "most significant relationship" test, Venezuela had most significant relationship to occurrences involved in punitive damage issue; and since Venezuela law did not recognize punitive damages, they were not proper); *James, supra.*

Shakespeare's argument was rejected by the District Judge, and the New York law of punitive damages was held to apply (App. 56, 59-60, R. 557, 560-561). If the District Court was in error in this regard, and if the Japanese law applies to the issue of punitive damages, then an award of punitive damages is precluded in this case, and the judgment notwithstanding the verdict ought to be affirmed in this respect.

C. *Because An Award Of Punitive Damages Is Precluded As A Matter Of Law In This Case, The District Court's Judgment Notwithstanding The Verdict Ought To Be Affirmed As to Punitive Damages, Even If It is Reversed As To Liability And Compensatory Damages.*